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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 18

UNITED STATES, APPELLANT,

vs.

NATIONAL DAIRY PRODUCTS CORP., ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

FILED JUNE 23, 1961

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INDEX

	Original	Print
Record from the United States District Court for the Western District of Missouri, Western Division	1	1
Indictment	1	1
Defendants' tentative statement of underlying facts and legal authorities	37	33
Motions of defendant, National Dairy Products Corporation to dismiss certain counts of the indictment, to strike certain material from the indictment, and for particulars of certain allegations of the indictment	58	52
Motions of defendant, Raymond J. Wise to dismiss count thirteen of the indictment, to strike certain material from the indictment, and for particulars of certain allegations of the indictment	78	68
Suggestions in support of defendant, National Dairy Products Corporation's motion to dismiss counts 2, 4, 6, 8, 10, 13 and 15 on the ground that the "Unreasonably low prices" clause of section 3 of the Robinson-Patman Act is unconstitutional	82	71

	Original	Print
Record from the United States District Court for the Western District of Missouri, Western Division—Continued		
Transcript of proceedings on hearing arguments on sundry motions	98	86
Appearances	98	86
Statement by the court	103	88
Ruling by court on defendant Wise's motion to dismiss counts 11 and 12	104	89
Ruling by court on supplementary motion of defendant Wise for particulars, counts 11 and 12	104	89
Other rulings by court	105	89
Argument on behalf of defendants by Mr. Chadwell	108	91
Reply argument on behalf of Government by Mr. Jinkinson	119	97
Reply argument on behalf of Government by Mr. Eisen	124	100
Reply argument on behalf of defendants, Mr. Chadwell	157	118
Statement and ruling by the court on counts 2, 4, 6, 8, 10, 13 and 15 of the indictment—dismissed	162	121
Order dismissing Robinson-Patman counts of indictment	164	122
Notice of appeal to the Supreme Court of the United States	166	124
Order extending time to docket appeal	171a	125
Clerk's certificates (omitted in printing)	172	
Order noting probable jurisdiction	173	126

[fol. 1] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION

Criminal Action No. 20542

(15 U.S.C. §§ 1 and 13a)

[Returned Sept. 16, 1959]

UNITED STATES OF AMERICA

v.

NATIONAL DAIRY PRODUCTS CORPORATION and RAYMOND J. WISE

INDICTMENT—Filed September 16, 1959

The grand jury charges:

Count One

The Defendant

1. National Dairy Products Corporation (hereinafter referred to as "National") is hereby indicted and made a defendant herein. National is a corporation organized and existing under the laws of the State of Delaware, with its executive offices in New York, New York. It is engaged in the business of purchasing, processing, distributing, and selling milk and other dairy products throughout the United States. Prior to December 1, 1956, National conducted its milk operations in the Missouri-Kansas area through its wholly owned subsidiary, the Chapman Dairy Company, a Delaware corporation.

2. The acts alleged in this indictment to have been done by National were authorized, ordered, or done by the officers, directors, employees, or agents thereof.

The Co-Conspirator

3. Merle Martin (hereinafter referred to as "Martin"), an independent milk distributor doing business in the Paola-Osawatomie, Kansas market is not made a defendant herein, but is named as a co-conspirator with National in the offense charged in this count of this indictment, and has performed acts and made statements in furtherance thereof.

[fol. 2] Definitions

4. Whenever used in this indictment, the term:

(a) "Milk" means cow's milk produced for sale for human consumption in fluid form as whole milk regardless of its butterfat content and milk by-products such as cottage cheese and sour cream.

(b) "Distributor" means any person, firm, or corporation engaged in the business of purchasing milk from National at its bottling plant in Kansas City, Missouri, for resale to the distributor's customers.

(c) "Greater Kansas City market" means the counties of Jackson and Clay in Missouri and Wyandotte and Johnson in Kansas.

(d) "Missouri-Kansas Area" means those markets in Kansas and Missouri in which milk bottled in National's Kansas City, Missouri plant is sold and distributed. Said area embraces both the Greater Kansas City market and the markets in which such milk is sold by distributors.

(*d*) "Paola-Osawatomie, Kansas market" means the territory in which distributor Merle Martin sells milk purchased from National.

(f) "Sedalia, Missouri market" means the territory in which distributor Raymond Newton sold milk purchased from National during the period from about January 1, 1957 through October 1958.

(g) "Lexington, Missouri market" means the territory in which distributor Chester Heyer sells milk purchased from National.

(h) "Mexico, Missouri market" means the territory in which distributor Dick Isaacs sells milk purchased from National.

[fol. 3] (i) "Glasgow, Missouri market" means the territory in which distributor Paul Craig sells milk purchased from National.

(j) "Butler, Missouri market" means the territory, including the town of Archie, Missouri, in which distributor Clifford Clark sells milk purchased from National.

(k) "Out-of-State dairy" means any corporation other than National bottling and selling milk in the Greater Kansas City market whose milk is also regularly sold outside the States of Missouri and Kansas.

(l) "Small dairy" means any corporation, partnership, person, or persons bottling milk exclusively in Missouri or Kansas and whose sales are usually confined within a radius of forty or fifty miles of its bottling plant.

(m) "In-store milk price" means the price at which milk is sold to stores by a distributor.

Nature of Trade and Commerce

5. The defendant National is the largest dairy corporation in the world. Its world-wide activities embrace four continents. In each of the years 1957 and 1958, National's sales in the United States and Canada alone totalled approximately one billion, five hundred million dollars, with net profits after taxes of approximately fifty million dollars. National closed the year 1958 with current assets of over two hundred and seventy-five million dollars and total assets of over five hundred and fifty-five million dollars. It has approximately fifty thousand employees. National's operations in the United States are broken down into six operating divisions, including the Sealtest Division, Kraft Foods Division, and four other divisions in related fields. Each of these divisions likewise has its own geographical operating divisions.

[fol. 4] 6. The Sealtest Division conducts numerous milk-

milk by-products, and ice cream processing and distributing operations through seven of its own geographical operating divisions. The Sealtest-Central Division is responsible for Sealtest operations in the area generally considered as the widwestern United States, with head offices in Chicago, Illinois. The operations of the Kansas City, Missouri plant of National are under the direction of the Sealtest-Central Division.

7. For the past several years National has competed in the Missouri-Kansas area with a number of out-of-State dairies and small dairies. The out-of-State dairies are national concerns which regularly sell milk in a number of sections of the United States, including the States of Missouri and Kansas. Each of the small dairies that competes with National and its distributors in the Missouri-Kansas area has only one bottling plant and is, in many instances, family-owned and operated. The annual sales of these small dairies usually do not exceed $300,000. Many of these small dairies have annual sales of less than $100,000 and net assets of less than $50,000.

8. National's plant in Kansas City, Missouri has used two methods of distributing milk in the Missouri-Kansas area. The first method has been the sale of milk through its own employee drivers directly to stores and home delivery customers. This system has been employed primarily in the Greater Kansas City market. The other method has been the sale of milk in paper carton containers to independent distributors who in turn resell such milk to their own customers, using their own trucks, and their own warehousing and refrigerating facilities. These distributors conduct their business for their own account and profit. Sales through distributors have been made in numerous cities and towns in Kansas and Missouri, for the most part outside of the Greater Kansas City market but within the Missouri-Kansas area.

[fol. 5] 9. During the period covered by this count of this indictment, National's Kansas City, Missouri plant has not normally bottled milk in glass containers for sale to stores. The milk which has been bottled in paper carton containers in National's Kansas City, Missouri plant has been sold and distributed throughout the Missouri-Kansas area. A substantial portion of the milk thus bottled and

sold and distributed throughout the Missouri-Kansas area was originally obtained from farms located in Kansas. Likewise substantial portions of the milk bottled in National's Kansas City, Missouri plant and originally produced on farms in Missouri have been sold and distributed in the Kansas portion of said area. Similarly, numerous competitors of National doing business in the Missouri-Kansas area have secured their milk from producers located in a State or States other than the State in which such milk has been sold or distributed.

10. National has distributorship agreements with various distributors doing business in the States of Missouri and Kansas. Among the distributors having such agreements with National and purchasing their milk from National's plant in Kansas City, Missouri are Chester Heyer, distributor for the Lexington, Missouri market; Raymond Newton, distributor for the Sedalia, Missouri market during the period January 1957 through approximately October 1958; Paul Craig, distributor for the Glasgow, Missouri market; Audrain County Dairy, distributor for the Mexico, Missouri market; Merle Martin, distributor for the Paola-Osawatomie, Kansas market; and Clifford Clark, distributor for the Butler, Missouri market. Under said agreements, these distributors have purchased milk from National for resale to their own wholesale and retail customers in their respective markets. These distributors are independent businessmen engaged in purchasing milk and reselling it on their own account for profit. They employ their own personnel, extend their own credit, and own their own trucks and storage facilities.

[fol. 6] 11. During the past several years, a substantial portion of the milk sold by said distributors has been purchased by National from a cooperative or cooperatives obtaining milk from producers located in the States of Kansas and Missouri. The milk produced on farms located in these two States has usually been commingled by the cooperatives and then delivered to National's plant in Kansas City, Missouri where it has been bottled by National. After the milk has been bottled it has, in most instances, been delivered to said distributors by a trucking firm employed by National. A substantial part of such sales and deliveries has been pursuant to price orders placed

by the distributors for the purpose of supplying their regular customers and to provide for other anticipated demands. In filling such orders, National has deliveries made regularly to its distributors located in Missouri three or four times each week. Thus, there has been a regular, substantial, and continuous flow of milk in interstate commerce from producers in Kansas to distributors selling milk in the State of Missouri. Three or four times each week, for the past several years, distributor Merle Martin has obtained milk from National directly from National's plant in Kansas City, Missouri, and then transported said milk in his own truck into the Paola-Osawatomie, Kansas market, where it has been sold to his customers in that market.

12. During the past several years, substantial amounts of milk sold in markets such as the Lexington, Missouri market, the Sedalia, Missouri market, the Mexico, Missouri market, the Glasgow, Missouri market, and the Butler, Missouri market have come from or have been commingled with milk coming from farms located in the State of Kansas. Likewise, substantial amounts of milk sold in the Paola-Osawatomie, Kansas market have come from or have been commingled with milk coming from farms located in the State of Missouri.

[fol. 7] 13. Most of the glass gallon containers and a substantial portion of the paper carton containers used to bottle milk sold in the above-named Missouri markets have come from States other than the State of Missouri.

14. Milk is a perishable commodity and can only be stored in fluid form for a relatively short time prior to its sale and consumption. Accordingly, it must reach the consumer within a short time after its production.

15. Therefore, there has been from day to day a continuous flow of milk in interstate commerce from producers in the States of Kansas and Missouri to the defendant's plant in Kansas City, Missouri, where it is bottled and then transported to distributors, stores, and consumers in the States of Kansas and Missouri, and all within a relatively short period of time.

16. Beginning in or about January 1955, the exact date to the grand jurors being unknown, and continuing until the return of this indictment, the defendant National, co-conspirator Martin, and others to the grand jurors unknown, have engaged in a combination and conspiracy to fix in-store milk prices and to eliminate competition in the sale of milk in the Paola-Osawatomie, Kansas market in unreasonable restraint of the aforesaid trade and commerce, in violation of Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", as amended (C. 647, 26 Stat. 209, 15 U.S.C. 1) commonly known as the Sherman Act.

17. The combination and conspiracy herein charged has consisted of a continuing agreement, understanding, and concert of action among defendant National, co-conspirator Martin, and others to the grand jurors unknown, the substantial terms of which are:

[fol. 8] (a) That Martin sell milk to stores at prices agreed upon with National;

(b) That National guarantee Martin a specific gross margin of profit on his sales of milk to stores at the prices agreed upon with National;

(c) That National and Martin persuade, induce, and coerce small dairies in the Paola Osawatomie, Kansas market to fix and maintain a price differential, acceptable to National, between milk sold by the small dairies in glass gallon containers and milk sold by Martin in paper carton containers;

(d) That National, for extended periods of time, sell milk to Martin below National's cost and Martin, in turn, resell it to stores at prices agreed upon with National for the purpose of restricting or eliminating the sale of milk by small dairies in the Paola Osawatomie, Kansas market.

18. During the period of time covered by this count of this indictment, and for the purpose of forming and effectuating the aforesaid combination and conspiracy the

defendant National and its co-conspirator Martin have done those things which hereinabove have been alleged that they have combined and conspired to do.

Effects

19. The effects of the aforesaid offense, among others, have been:

(a) To cause milk price wars, for extended periods of time, in the Paola-Osawatomie, Kansas market;

(b) To cause small dairies in said market to suffer severe financial losses in order to compete against below-cost milk prices financed by the resources of National;

[fol. 9] (c) To allow Martin to engage in price wars at a financial profit to himself while at the same time inflicting financial losses on small dairies;

(d) To restrict or eliminate the sale of milk in glass gallon containers in said market.

Jurisdiction and Venue

20. The combination and conspiracy alleged in this count of this indictment was entered into and carried out in part within the Western District of Missouri, Western Division, and within the jurisdiction of this Court. During the period of time covered by this count of this indictment and within the five years next preceding the return thereof, the defendant and the co-conspirator have performed within the Western District of Missouri, Western Division, many of the acts and things which, as herein alleged, they conspired to do.

Count Two

21. Each and every allegation contained in paragraphs 1 and 2 and paragraphs 4 through 15 of this indictment is here re-alleged with the same force and effect as though said paragraphs were herein set forth in full.

Offense Charged—Robinson-Patman Act

22. Beginning on or about July 15, 1958 and continuing thereafter until about August 27, 1958, the exact dates being to the grand jurors unknown, National, while engaged in the aforesaid interstate commerce and in the course of said commerce, sold milk to its distributor in the Paola-Osawatomie, Kansas market at unreasonably low prices for the purpose of destroying competition in the Paola-Osawatomie, Kansas market in violation of Section 3 of the Act of Congress of June 19, 1936 (49 Stat. 1528, 15 U.S.C. § 13a), commonly known as the Robinson-Patman Act.

[fol. 10] 23. Pursuant to and in effectuation of the offense charged in paragraph 22 of this indictment, National utilized the advantages it possesses by reason of the fact that it operates in a great many different geographical localities in order to finance and subsidize a price war against small dairies selling milk in competition with it and its distributor in the Paola-Osawatomie, Kansas market by intentionally selling milk to its distributor Martin at prices below National's cost.

Effects.

24. The effects of the aforesaid offense, among others, have been to cause severe financial losses to small dairies doing business in the Paola-Osawatomie, Kansas market and to cause such dairies to suffer losses in sales volume.

Jurisdiction and Venue

25. The offense alleged in this count of this indictment was entered into and carried out in part within the Western District of Missouri, Western Division, and within the jurisdiction of this Court. During the period of time covered by this count of this indictment and within the five years next preceding the return thereof, the defendant has performed within the Western District of Missouri, Western Division, many of the acts referred to in paragraph 23 of this indictment.

Count Three

26. Each and every allegation contained in paragraphs 1 and 2 and paragraphs 4 through 15 of this indictment is here re-alleged with the same force and effect as though said paragraphs were herein set forth in full.

The Co-Conspirator

27. Raymond Newton (hereinafter referred to as "Newton"), an independent milk distributor doing business in [fol. 11] Sedalia, Missouri, is not made a defendant herein, but is named as a co-conspirator with National in the offense charged in this count of this indictment, and has performed acts and made statements in furtherance thereof.

Offense Charged—Sherman Act

28. Beginning in or about January 1957, and continuing until about October 1958, the exact dates to the grand jurors being unknown, defendant National, co-conspirator Newton, and others to the grand jurors unknown, engaged in a combination and conspiracy to fix in-store milk prices and to eliminate competition in the sale of milk in the Sedalia, Missouri market in unreasonable restraint of the aforesaid trade and commerce, in violation of Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", as amended (C. 647, 26 Stat. 209, 15 U.S.C. § 1), commonly known as the Sherman Act.

29. The combination and conspiracy herein charged consisted of a continuing agreement, understanding, and concert of action among defendant National, co-conspirator Newton, and others to the grand jurors unknown, the substantial terms of which were:

(a) That Newton sell milk to stores at prices agreed upon with National;

(b) That National guarantee Newton a specific gross margin of profit on his sales of milk to stores at the prices agreed upon with National;

(c) That National agree to sell milk in paper carton containers to Newton below its cost or at special dis-

count prices, for extended periods of time, so that said milk may be resold by Newton at prices designed to restrict or eliminate the sale of milk in glass gallon containers;

[fol. 12] (d) That National, for extended periods of time, sell milk to Newton below National's cost and Newton, in turn, resell it to stores at prices agreed upon with National for the purpose of restricting or eliminating the sale of milk by small dairies in the Sedalia, Missouri market.

30. During the period of time covered by this count of this indictment, and for the purpose of forming and effectuating the aforesaid combination and conspiracy, the defendant National and its co-conspirator Newton have done those things which hereinabove have been alleged that they have combined and conspired to do.

Effects

31. The effects of the aforesaid offense, among others, have been:

(a) To cause milk price wars, for extended periods of time, in the Sedalia, Missouri market;

(b) To cause small dairies in said market to suffer substantial financial losses in order to compete against below-cost milk prices financed by the resources of National;

(c) To allow Newton to engage in price wars at a financial profit to himself while at the same time inflicting financial losses on small dairies;

(d) To restrict or eliminate the sale of milk in glass gallon containers in said market.

Jurisdiction and Venue

32. The combination and conspiracy alleged in this count of this indictment was entered into and carried out in part within the Western District of Missouri, Western Division, and within the jurisdiction of this Court. During the period of time covered by this count of this indictment and within

[fol. 13] the five years next preceding the return thereof, defendant and co-conspirator have performed within the Western District of Missouri, Western Division, many of the acts and things which, as herein alleged, they combined and conspired to do.

Count Four

33. Each and every allegation contained in paragraphs 1 and 2 and paragraphs 4 through 15 of this indictment is here re-alleged with the same force and effect as though said paragraphs were herein set forth in full.

Offense Charged—Robinson-Patman Act

34. Beginning on or about July 17, 1957, and continuing thereafter until some time in 1958, the exact dates being to the grand jurors unknown, National, while engaged in the aforesaid interstate commerce and in the course of said commerce, sold milk to its distributor in the Sedalia, Missouri market at unreasonably low prices for the purpose of destroying competition in the Sedalia, Missouri market, in violation of Section 3 of the Act of Congress of June 19, 1936 (49 Stat. 1528, 15 U.S.C. § 13a), commonly known as the Robinson-Patman Act.

35. Pursuant to and in effectuation of the offense charged in paragraph 34 of this indictment, National utilized the advantages it possesses by reason of the fact that it operates in a great many different geographical localities in order to finance and subsidize a price war against the small dairies selling milk in competition with it and its distributor in Sedalia, Missouri by intentionally selling milk to its distributor Newton at prices below National's cost.

Effects

36. The effects of the aforesaid offense, among others, have been to cause severe financial losses to small dairies doing business in the Sedalia, Missouri market and to cause such dairies to suffer losses in sales volume.

[fol. 14] Jurisdiction and Venue

37. The offense alleged in this count of this indictment was entered into and carried out in part within the Western District of Missouri, Western Division, and within the jurisdiction of this Court. During the period of time covered by this count of this indictment and within the five years next preceding the return thereof, the defendant has performed within the Western District of Missouri, Western Division, many of the acts referred to in paragraph 35 of this indictment.

Count Five

38. Each and every allegation contained in paragraph 1 and 2 and paragraphs 4 through 15 of this indictment is here re-alleged with the same force and effect as though said paragraphs were herein set forth in full.

The Co-Conspirator

39. Chester Heyer (hereinafter referred to as "Heyer"), an independent milk distributor doing business in the Lexington, Missouri market, is not made a defendant herein, but is named as a co-conspirator with National in the offense charged in this count of this indictment, and has performed acts and made statements in furtherance thereof.

Offense Charged—Sherman's Act

40. Beginning in or about January 1956, the exact date being to the grand jurors unknown, and continuing until the return of this indictment, the defendant National, co-conspirator Heyer, and others to the grand jurors unknown, have engaged in a combination and conspiracy to fix in-store milk prices and to eliminate competition in the sale of milk in the Lexington, Missouri market in unreasonable restraint of the aforesaid trade and commerce, in violation of Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", as amended (C. 647, 26 Stat. 209, 15 U.S.C. § 1), commonly known as the Sherman Act.

[fol. 15] 41. The combination and conspiracy herein charged has consisted of a continuing agreement, under-

standing, and concert of action among defendant National, co-conspirator Heyer, and others to the grand jurors unknown, the substantial terms of which are:

(a) That Heyer sell milk to stores at prices agreed upon with National;

(b) That National guarantee Heyer a specific gross margin of profit on his sales of milk to stores at the prices agreed upon with National;

(c) That National agree to sell milk in paper carton containers to Heyer below its cost or at special discount prices, for extended periods of time, so that said milk may be resold by Heyer at prices designed to restrict or eliminate the sale of milk in glass gallon containers;

(d) That National, for extended periods of time, sell milk to Heyer below National's cost and Heyer, in turn, resell it to stores at prices agreed upon with National for the purpose of restricting or eliminating the sale of milk by small dairies in the Lexington, Missouri market.

42. During the period of time covered by this count of this indictment, and for the purpose of forming and effectuating the aforesaid combination and conspiracy, the defendant National and its co-conspirator Heyer have done those things which hereinabove have been alleged that they have combined and conspired to do.

Effects

43. The effects of the aforesaid offense, among others, have been:

(a) To cause milk price ways, for extended periods of time, in the Lexington, Missouri market;

[fol. 16] (b) To cause small dairies in said market to suffer severe financial losses in order to compete against below-cost milk prices financed by the resources of National;

(c) To allow Heyer to engage in price war at a financial profit to himself while at the same time inflicting financial losses on small dairies;

(d) To restrict or eliminate the sale of [illegible] gallon containers in said market.

Jurisdiction and Venue

44. The combination and conspiracy alleged in this count of this indictment was entered into and carried out in part within the Western District of Missouri, Western Division, and within the jurisdiction of this Court. During the period of time covered by this count of this indictment and within the five years next preceding the return thereof, the defendant and its co-conspirators have performed within the Western District of Missouri, Western Division, many of the acts and things which, as hereinafter alleged, they combined and conspired to do.

Count Six

45. Each and every allegation contained in paragraphs 1 and 2 and paragraphs 4 through 15 of this indictment is hereby re-alleged with the same force and effect as though said paragraphs were herein set forth in full.

Offense Charged—Robinson-Patman Act

46. Beginning on or about October 1, 1957 and continuing thereafter until about April 1, 1958, the exact dates being to the grand jurors unknown, National, while engaged in the aforesaid interstate commerce and in the course of said commerce, sold milk to its distributor in the Lexington, Missouri market at unreasonably low prices for the purpose of destroying competition in the Lexington, Missouri market, in violation of Section 3 of the Act of Congress of June 19, 1936 (49 Stat. 1528, 15 U.S.C. § 13), commonly known as the Robinson-Patman Act.

[fol. 17] 47. Pursuant to and in effectuation of the offense charged in paragraph 46 of this indictment, National utilized the advantages it possesses by reason of the fact that it operates in a great many different geographical localities in order to finance and subsidize a price war

against small dairies selling milk in competition with it and its distributor in the Lexington, Missouri market, by intentionally selling milk to its distributor Heyer at prices below National's cost.

Effects

48. The effects of the aforesaid offense, among others, have been to eliminate competition in the Lexington, Missouri market and to drive small dairies from that market.

Jurisdiction and Venue

49. The offense alleged in this count of this indictment was entered into and carried out in part within the Western District of Missouri, Western Division, and within the jurisdiction of this Court. During the period of time covered by this count of this indictment and within the five years next preceding the return thereof, the defendant has performed within the Western District of Missouri, Western Division, many of the acts referred to in paragraph 47 of this indictment.

Count Seven

50. Each and every allegation contained in paragraphs 1 and 2 and paragraphs 4 through 15 of this indictment is here re-alleged with the same force and effect as though said paragraphs were herein set forth in full.

The Co-Conspirators

51. Audrain County Dairy (hereinafter referred to as "Audrain"), an independent milk distributor doing busi- [fol. 18] ness in Mexico, Missouri, and Dick Isaacs, its principal officer, are not made defendants herein, but are named as co-conspirators with National in the offense charged in this count of this indictment and have performed acts and made statements in furtherance thereof.

Offense Charged—Sherman Act

52. Beginning in or about March 1957, and continuing until about January 1958, the exact dates being to the grand jurors unknown, defendant National, co-conspirators Audrain and Isaacs, and others to the grand jurors unknown,

engaged in a combination and conspiracy to fix in-store milk prices and to eliminate competition in the sale of milk in the Mexico, Missouri market in unreasonable restraint of the aforesaid trade and commerce, in violation of Section 1 of the Act of Congress of July 2, 1890, entitled "an Act to protect trade and commerce against unlawful restraints and monopolies," as amended (C. 647, 26 Stat. 209, 15 U.S.C. § 1), commonly known as the Sherman Act.

53. The combination and conspiracy herein charged consisted of a continuing agreement, understanding, and concert of action among defendant National, co-conspirators Aucrain and Isaacs, and others to the grand jurors unknown, the substantial terms of which were:

(a) That Andrain sell milk to stores at prices agreed upon with National;

(b) That National guarantee Andrain a specific gross margin of profit on its sales of milk to stores at the prices agreed upon with National;

(c) That Andrain attempt to get small dairies to increase their milk prices;

(d) That National agree to sell milk in paper carton containers to Andrain below its cost or at special discount prices, for extended periods of time, so that said milk may be resold by Andrain at prices designed [fol. 19] to restrict or eliminate the sale of milk in glass gallon containers;

(e) That National, for extended periods of time, sell milk to Andrain below National's cost and Andrain, in turn, resell it to stores at prices agreed upon with National for the purpose of restricting or eliminating the sale of milk by small dairies in the Mexico, Missouri market.

54. During the period of time covered by this count of this indictment, and for the purpose of forming and effectuating the aforesaid combination and conspiracy, the defendant National and its co-conspirators have done those things which hereinabove have been alleged that they have combined and conspired to do.

Effects

55. The effects of the aforesaid offense, among others, have been:

(a) To cause milk price wars, for extended periods of time in the Mexico, Missouri market;

(b) To cause small dairies in said market to suffer substantial financial losses in order to compete against below-cost milk prices financed by the resources of National;

(c) To allow Audrain to engage in milk price wars at a financial profit to itself while at the same time inflicting financial losses on small dairies;

(d) To restrict or eliminate the sale of milk in glass gallon containers in said market.

Jurisdiction and Venue

56. The combination and conspiracy alleged in this count of this indictment was entered into and carried out in part within the Western District of Missouri, Western Division, and within the jurisdiction of this Court. Dur- [fol. 20] ing the period of time covered by this count of this indictment and within the five years next preceding the return thereof, the defendant and the co-conspirators have performed within the Western District of Missouri, Western Division, many of the acts and things which, as herein alleged, they combined and conspired to do.

Count Eight

57. Each and every allegation contained in paragraphs 1 and 2 and paragraphs 4 through 15 of this indictment is here re-alleged with the same force and effect as though said paragraphs were herein set forth in full.

Offense Charged—Robinson-Patman Act

58. Beginning in or about March 1957, and continuing thereafter until about January 1958, the exact dates being to the grand jurors unknown, National, while engaged in the aforesaid interstate commerce and in the course of

said commerce, sold milk to its distributor in the Mexico, Missouri market at unreasonably low prices for the purpose of destroying competition in the Mexico, Missouri market, in violation of Section 3 of the Act of Congress of June 19, 1936 (49 Stat. 1528, 15 U.S.C. 13a), commonly known as the Robinson-Patman Act.

59. Pursuant to and in effectuation of the offense charged in paragraph 58 of this indictment, National utilized the advantages it possesses by reason of the fact that it operates in a great many different geographical localities in order to finance and subsidize a price war against small dairies selling milk in competition with it and its distributor in the Mexico, Missouri market by intentionally selling milk to said distributor at prices below National's cost.

[fol. 21] Effects

60. The effects of the aforesaid offense, among others, have been to cause milk to be sold below cost and to cause severe financial losses to small dairies doing business in the Mexico, Missouri market and to cause such dairies to suffer losses in sales volume.

Jurisdiction and Venue

61. The offense alleged in this count of this indictment was entered into and carried out in part within the Western District of Missouri, Western Division, and within the jurisdiction of this Court. During the period of time covered by this count of this indictment and within the five years next preceding the return thereof, the defendant has performed within the Western District of Missouri, Western Division, many of the acts referred to in paragraph 59 of this indictment.

Count Nine

62. Each and every allegation contained in paragraphs 1 and 2 and paragraphs 4 through 15 of this indictment is here re-alleged with the same force and effect as though said paragraphs were herein set forth in full.

The Co-Conspirator

63. Paul Craig (hereinafter referred to as "Craig"), an independent milk distributor doing business in Glasgow, Missouri, is not made a defendant herein, but is named as a co-conspirator with National in the offense charged in this count of this indictment, and has performed acts and made statements in furtherance thereof.

Offense Charged—Sherman Act

64. Beginning in or about June 1957, and continuing until about May 1958, the exact dates being to the grand jurors unknown, the defendant National, co-conspirator [fol. 22] Craig, and others to the grand jurors unknown, engaged in a combination and conspiracy to fix in-store milk prices and to eliminate competition in the sale of milk in the Glasgow, Missouri market in unreasonable restraint of the aforesaid trade and commerce, in violation of Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", as amended (C. 647, 26 Stat. 209, 15 U.S.C. § 1), commonly known as the Sherman Act.

65. The combination and conspiracy herein charged consisted of a continuing agreement, understanding, and concert of action among defendant National, co-conspirator Craig, and others to the grand jurors unknown, the substantial terms of which were:

(a) That Craig sell milk to stores at prices agreed upon with National;

(b) That National guarantee Craig a specific gross margin of profit on his sales of milk to stores at the prices agreed upon with National;

(c) That Craig attempt to get small dairies selling milk in the Glasgow, Missouri market to increase their prices;

(d) That National agree to sell milk in paper carton containers to Craig below its cost or at special discount prices, for extended periods of time, so that said milk may be resold by Craig at prices designed to re-

strict or eliminate the sale of milk in glass gallon containers;

(e) That National, for extended periods of time, sell milk to Craig below National's cost and Craig, in turn, resell it to stores at prices agreed upon with National [fol. 23] for the purpose of restricting or eliminating the sale of milk by small dairies in the Glasgow, Missouri market.

66. During the period of time covered by this count of this indictment, and for the purpose of forming and effectuating the aforesaid combination and conspiracy, defendant National and its co-conspirator Craig have done those things which hereinabove have been alleged that they have combined and conspired to do.

Effects

67. The effects of the aforesaid offense, among others, have been:

(a) To cause milk price wars, for extended periods of time, in the Glasgow, Missouri market;

(b) To cause small dairies in said market to suffer substantial financial losses in order to compete against below-cost milk prices financed by the resources of National;

(c) To allow Craig to engage in price wars at a financial profit to himself while at the same time inflicting financial losses on the small dairies;

(d) To restrict or eliminate the sale of milk in glass gallon containers in the Glasgow, Missouri market.

Jurisdiction and Venue

68. The combination and conspiracy alleged in this count of this indictment was entered into and carried out in part within the Western District of Missouri, Western Division, and within the jurisdiction of this Court. During the period of time covered by this count of this indictment and within the five years next preceding the return thereof, [fol. 24] the defendant and its co-conspirator have per-

formed within the Western District of Missouri, Western Division, many of the acts and things which, as herein alleged, they combined and conspired to do.

Count Ten

69. Each and every allegation contained in paragraphs 1 and 2 and paragraphs 4 through 15 of this indictment is here re-alleged with the same force and effect as though said paragraphs were herein set forth in full.

Offense Charged—Robinson-Patman Act

70. Beginning in or about June 1957, and continuing thereafter until about May 1958, the exact dates being to the grand jurors unknown, National, while engaged in the aforesaid interstate commerce and in the course of said commerce, sold milk to its distributor in the Glasgow, Missouri market at unreasonably low prices, for the purpose of destroying competition in the Glasgow, Missouri market, in violation of Section 3 of the Act of Congress of June 19, 1936 (49 Stat. 1528, 15 U.S.C. § 13a), commonly known as the Robinson-Patman Act.

71. Pursuant to and in effectuation of the offense charged in paragraph 70 of this indictment, National utilized the advantages it possesses by reason of the fact that it operates in a great many different geographical localities in order to finance and subsidize a price war against small dairies selling milk in competition with it and its distributor in the Glasgow, Missouri market by intentionally selling milk to its distributor Craig at prices below National's cost.

Effects

72. The effects of the aforesaid offense, among others, have been to cause severe financial losses to the small dairies doing business in the Glasgow, Missouri market and to cause such dairies to suffer substantial losses in sales volume.

[fol. 25] Jurisdiction and Venue

73. The offense alleged in this count of this indictment was entered into and carried out in part within Western District of Missouri, Western Division, and within the jurisdiction of this Court. During the period of time covered by this count of this indictment and within the five years next preceding the return thereof, the defendant has performed within the Western District of Missouri, Western Division, many of the acts referred to in paragraph 71 of this indictment.

Count Eleven

74. Each and every allegation contained in paragraphs 1 and 2 and paragraphs 4 through 19 of this indictment is here re-alleged with the same force and effect as though said paragraphs were herein set forth in full.

The Co-Defendant

75. Raymond J. Wise (hereinafter referred to as "Wise"), whose business address is 75 East Wacker Drive, Chicago, Illinois, is hereby indicted and made a defendant in this count of this indictment. Defendant Wise, during all of the period covered by this count of this indictment, has been a vice-president and director of National and has been within said period and within the last five years actively engaged in the management, direction, and control of the affairs, policies, and acts of National, and has authorized or ordered to be done some or all of the acts alleged in this count of this indictment to have been done by National.

The Co-Conspirators

76. All out-of-State dairies, doing business in the Greater Kansas City market and having their principal executive offices located outside the States of Missouri and Kansas, [fol. 26] and their officers, and agents are not named as defendants herein but participated as co-conspirators with the defendants in the offense hereinafter charged, and have performed acts and made statements in furtherance thereof.

Offense Charged—Sherman Act

77. Beginning in or about September 1957 and continuing until some time in October of 1957, the exact dates being to the grand jurors unknown, the defendants National and Wise, the co-conspirators, and other persons to the grand jurors unknown, engaged in a combination and conspiracy to eliminate price competition in the sale of milk in the Greater Kansas City market in unreasonable restraint of the aforesaid trade and commerce, in violation of Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", as amended (C. 647, 26 Stat. 209, 15 U.S.C. § 1) commonly known as the Sherman Act.

78. The combination and conspiracy herein charged consisted of a continuing agreement, understanding, and concert of action among the defendants, the co-conspirators, and others to the grand jurors unknown, the substantial terms of which were that they agree:

(a) To hold meetings in Chicago, Illinois and Kansas City, Missouri, to discuss ways and means to:

(1) Require the Meyer Sanitary Milk Company to withdraw a certain discount it had offered on or about August 1, 1957 to Milgram Food Stores, one of the largest grocery chains in the Kansas City market; and

(2) Require the small dairies selling milk in glass gallon containers to narrow the price differential between milk sold in such containers and milk sold in paper cartons;

[fol. 27] (b) To start a milk price war on or about September 13, 1957 by substantially depressing milk prices;

(c) To limit the milk price war to the Greater Kansas City market;

(d) To increase their milk prices on or about October 10, 1957 to levels above those prevailing in the Greater Kansas City market prior to September 13, 1957; and

(c) To induce and coerce small dairies selling milk in glass gallon containers to raise their prices on or about October 10, 1957.

79. During the period of time covered by this count of this indictment and for the purpose of forming and effectuating the aforesaid combination and conspiracy, the defendants and their co-conspirators have done those things which hereinabove have been alleged that they have combined and conspired to do.

Effects

80. The effects of the aforesaid offense, among others, have been:

(a) To increase the selling price of milk sold in the Greater Kansas City market in glass gallon containers;

(b) To restrict the sale of milk in glass gallon containers in the Greater Kansas City market;

(c) To cause small dairies to sell milk at a loss;

(d) To cause small dairies to sustain severe financial losses; and

(e) To raise milk prices higher than those prevailing before the aforesaid combination and conspiracy.

[fol. 28] Jurisdiction and Venue

81. The combination and conspiracy alleged in this count of this indictment was entered into and carried out in part within the Western District of Missouri, Western Division, and within the jurisdiction of this Court. During the period of time covered by this count of this indictment and within the five years next preceding the return thereof, the defendants and the co-conspirators have performed within the Western District of Missouri, Western Division, many of the acts and things which, as herein alleged, they combined and conspired to do.

Count Twelve

82. Each and every allegation contained in paragraphs 1 and 2 and paragraphs 4 through 15 of this indictment is here re-alleged with the same force and effect as though said paragraphs were herein set forth in full.

The Co-Defendant

83. Raymond J. Wise (hereinafter referred to as "Wise"), whose business address is 75 East Wacker Drive, Chicago, Illinois, is hereby indicted and made a defendant in this count of this indictment. Defendant Wise, during all of the period covered by this count of this indictment, has been a vice president and director of National and has been within said period and within the last five years actively engaged in the management, direction, and control of the affairs, policies, and acts of National, and has authorized or ordered to be done some or all of the acts alleged in this count of this indictment to have been done by National.

The Co-Conspirators

84. All out-of-State dairies, doing business in the Greater Kansas City market and having their principal executive offices located outside the States of Missouri and Kansas, [fol. 20] and their officers and agents are not made defendants herein but participated as co-conspirators with the defendants in the offense here charged and have performed acts and made statements in furtherance thereof.

Offense Charged—Sherman Act

85. Beginning in or about June 1958 and continuing until about October 1958, the exact dates being to the grand jurors unknown, the defendants National and Wise, the co-conspirators, and other persons to the grand jurors unknown, engaged in a combination and conspiracy to eliminate price competition in the sale of milk in the Greater Kansas City market in unreasonable restraint of the aforesaid interstate trade and commerce, in violation of Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful

restraints and monopolies"; as amended (C. 647, 26 Stat. 209, 15 U.S.C. 1), commonly known as the Sherman Act.

86. The combination and conspiracy herein charged consisted of a continuing agreement, understanding, and concert of action among the defendants, the co-conspirators, and others to the grand jurors unknown, the substantial terms of which were that they agree:

(a) To hold meetings to devise plans for depressing, stabilizing, and increasing milk prices in the Greater Kansas City market;

(b) To follow a plan for depressing, stabilizing, and increasing milk prices by:

(1) Lowering prices on or about July 14, 1958;

(2) Raising prices on or about August 27, 1958;

(3) Raising prices again on or about October 1, 1958;

(c) To induce and coerce small dairies selling milk in glass gallon containers to raise their prices.

[fol. 30] 87. During the period of time covered by this count of this indictment, and for the purpose of forming and effectuating the aforesaid combination and conspiracy, the defendants and their co-conspirators have done those things which hereinabove have been alleged that they have combined and conspired to do.

Effects

88. The effects of the aforesaid offense, among others, have been:

(a) To increase the selling price of milk sold in the Greater Kansas City market in glass gallon containers;

(b) To restrict the sale of milk in glass gallon containers in the Greater Kansas City market;

(c) To cause small dairies to sell milk at a loss;

(d) To cause small dairies to sustain severe financial losses; and

(e) To raise milk prices higher than those prevailing before the aforesaid combination and conspiracy.

Jurisdiction and Venue

89. The combination and conspiracy alleged in this count of this indictment was entered into and carried out in part within the Western District of Missouri, Western Division, and within the jurisdiction of this Court. During the period of time covered by this count of this indictment and within the five years next preceding the return thereof, the defendants and the co-conspirators have performed within the Western District of Missouri, Western Division, many of the acts and things which, as herein alleged, they combined and conspired to do.

[fol. 31] Count Thirteen

90. Each and every allegation contained in paragraphs 1 and 2 and paragraphs 4 through 15 of this indictment is here re-alleged with the same force and effect as though said paragraphs were herein set forth in full.

The Co-Defendant

91. Raymond J. Wise (hereinafter referred to as "Wise") is hereby indicted and made a defendant in this count of this indictment. Said defendant is a vice president and a director of defendant National and has his office in Chicago, Illinois. Defendant Wise authorized or ordered to be done some or all of the acts alleged in this count of this indictment to have been done by National.

Offense Charged—Robinson-Patman Act

92. Beginning on or about June 20, 1958 and continuing thereafter until about September 1958, the exact dates being to the grand jurors unknown, National, acting through its officers and directors, including defendant Wise, while engaged in the aforesaid interstate commerce and in the course of said commerce, sold milk in the Greater Kansas City market at unreasonably low prices for the purpose of destroying competition in the Greater Kansas City market, in violation of Section 3 of the Act of Congress of

June 19, 1936 (49 Stat. 1526, 15 U.S.C. [illegible] known as the Robinson Patman Act.

93. Pursuant to and in effectuation of the offense charged in paragraph 92 of this indictment, National utilized the advantages it possesses by reason of the fact that it operates in a great many different geographical localities in order to finance and subsidize a price war against the small dairies selling milk in competition with it in the Greater Kansas City market by intentionally selling milk to its customers at prices which were below cost.

[fol. 32]

Effects

94. The effects of the aforesaid offense among others have been:

(a) To force small dairies to sustain severe financial losses, or losses in sales volume, or both.

(b) To force some small dairies to request quotas selling their products to refrain from advertising or selling said products at low prices in an effort to appease National, and thereby, induce it not to start another price war.

Jurisdiction and Venue

95. The offense alleged in this count of this indictment was entered into and carried out in part within the Western District of Missouri, Western Division, and within the jurisdiction of this Court. During the period of time covered by this count of this indictment, to wit, the [illegible] years next preceding the return thereof, the defendants and the co-conspirators have performed within the Western District of Missouri, Western Division, many of the acts referred to in paragraph 93 of this indictment.

Grand Fourteen

96. Each and every allegation contained in paragraphs 1 and 2 and paragraphs 4 through 15 of this indictment is hereby realleged with the same force and effect as though said paragraphs were herein set forth in full.

The Co-Conspirator

97. Clifford Clark (hereinafter referred to as "Clark"), an independent milk distributor doing business in the Butler, Missouri market, is not made a defendant herein, but is named as a co-conspirator with National in the offense charged in this count of this indictment, and has performed acts and made statements in furtherance thereof.

[fol. 33] Offense Charged—Sherman Act

98. Beginning in or about September 1956, the exact date being to the grand jurors unknown, and continuing until the return of this indictment, the defendant National, co-conspirator Clark, and others to the grand jurors unknown, have engaged in a combination and conspiracy to fix in-store milk prices and to eliminate competition in the sale of milk in the Butler, Missouri market in unreasonable restraint of the aforesaid trade and commerce, in violation of Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," as amended (c. 647, 26 Stat. 209, 15 U.S.C. § 1), commonly known as the Sherman Act.

99. The combination and conspiracy herein charged has consisted of a continuing agreement, understanding, and concert of action among defendant National, co-conspirator Clark, and others to the grand jurors unknown, the substantial terms of which are:

(a) That Clark sell milk to stores at prices agreed upon with National;

(b) That National guarantee Clark a specific gross margin of profit on his sales of milk to stores at the prices agreed upon with National;

(c) That National agree to sell milk in paper carton containers to Clark below its cost or at special discount prices for extended periods of time, so that said milk may be resold by Clark at prices designed to restrict or eliminate the sale of milk in glass gallon containers;

(d) That National, for extended periods of time, sell milk to Clark below National's cost and Clark, in turn,

resell it to stores at prices agreed upon with National [fol. 34] for the purpose of restricting or eliminating the sale of milk by small dairies in the Butler, Missouri market.

100. During the period of time covered by this count of this indictment, and for the purpose of forming and effectuating the aforesaid combination and conspiracy, the defendant National and its co-conspirator Clark have done those things which hereinabove have been alleged that they have combined and conspired to do.

Effects

101. The effects of the aforesaid offense, among others, have been:

(a) To cause milk prices for extended periods of time in the Butler, Missouri market;

(b) To cause small dairies in said market to suffer severe financial losses in order to compete against below-cost milk prices financed by the resources of National;

(c) To allow Clark to engage in price wars at a financial profit to himself while at the same time inflicting financial losses on small dairies;

(d) To restrict or eliminate the sale of milk in glass gallon containers in said market.

Jurisdiction and Venue

102. The combination and conspiracy alleged in this count of this indictment was entered into and carried out in part within the Western District of Missouri, Western Division, and within the jurisdiction of this Court. During the period of time covered by this count of this indictment and within the five years next preceding the return thereof, the defendant and its co-conspirator have performed within the Western District of Missouri, Western Division, many of the acts and things which, as herein alleged, they combined and conspired to do.

Count Fifteen

103. Each and every allegation contained in paragraphs 1 and 2 and paragraphs 4 through 15 of this indictment is [fol. 35] here re-alleged with the same force and effect as though said paragraphs were herein set forth in full.

Offense Charged—Robinson-Patman Act

104. Beginning on or about September 1, 1956 and continuing thereafter until about May 1, 1957, the exact dates being to the grand jurors unknown, National, while engaged in the aforesaid interstate commerce and in the course of said commerce, sold milk to its distributor in the Butler, Missouri market at unreasonably low prices for the purpose of destroying competition in the town of Archie, Missouri, in violation of Section 3 of the Act of Congress of June 19, 1936 (49 Stat. 1528, 15 U.S.C. 13a), commonly known as the Robinson-Patman Act.

105. Pursuant to and in effectuation of the offense charged in paragraph 104 of this indictment, National utilized the advantages it possesses by reason of the fact that it operates in a great many different geographical localities in order to finance and subsidize a price war against small dairies selling milk in competition with it and its distributor in the town of Archie, Missouri by intentionally selling milk to its distributor Clark at prices below National's cost.

Effect

106. The effects of the aforesaid offense, among others, have been to eliminate competition in the Butler, Missouri market and to drive small dairies from that market.

Jurisdiction and Venue

107. The offense alleged in this count of this indictment was entered into and carried out in part within the Western District of Missouri, Western Division, and within the jurisdiction of this Court. During the period of time covered by this count of this indictment and within the five years next preceding the return thereof, the defendant has performed within the Western District of Missouri,

Western Division, many of the acts referred to in paragraph 195 of this indictment.

[fol. 36] Dated: September 16, 1959

A True Bill: /s/ McKinley Wooden, Foreman. /s/ Robert A. Bicks, Acting Assistant Attorney General. /s/ Charles L. Whittinghill, Attorney, Department of Justice. /s/ Edward L. Scheufler, United States Attorney.

/s/ Earl A. Jinkinson, /s/ James E. Mann, /s/ Robert L. Eisen, Attorneys, Department of Justice, Room 404, United States Courthouse, Chicago 4, Illinois, Webster 9-2395.

[fol. 37] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION

No. 20342

[Title omitted]

DEFENDANTS' TENTATIVE STATEMENT OF UNDERLYING FACTS AND LEGAL AUTHORITIES—Filed November 13, 1959

Preliminary Statement

The indictment herein was returned on September 16, 1959. On October 9, 1959, defendants appeared by their attorneys at the arraignment and entered pleas of not guilty. Following the arraignment, a pretrial conference was held with the Court, and thereafter, on October 21, 1959, an order of this Court was entered directing the Government and defendants to file with the Court their tentative statements of underlying facts and legal authorities relied upon.

On October 29, 1959, defendants were served with copies of a document entitled "Tentative Statement of The Underlying Facts and Legal Authorities Supporting Government's Charges." This document sets forth in terms nearly as broad and general as the language of the Sherman and

Robinson-Patman Acts the Government's legal theory. The Government's Tentative Statement is less definite in its fact recitals than the indictment itself, and in no sense can be said to set forth "underlying facts."

In numerous important respects the indictment is couched in vague and indefinite language. Since Court records indicate that this matter was investigated and presented to the Grand Jury through a host of witnesses over a period [fol. 38] of more than than a year, it strains credulity to attribute the vagueness of the indictment to lack of knowledge by the Government. On top of this, the general and conclusory nature of the Government's Tentative Statement of Underlying Facts leaves no room for doubt that both documents are intentionally uninformative.

Purely as examples of charges upon which defendants require specification in order to prepare for trial are the following: (1) The indictment repeatedly refers to "out-of-State dairies" and "small dairies." It is charged that defendants conspired with the former and competitively injured the latter. Obviously, defendants cannot wait for the six to nine days of trial which the Government estimates it will take to present its evidence to learn the identity of the dairies in the two classifications, and which ones are claimed to be in which classification. (2) In Counts One (p.1), Three (p.10), Five (p.14), Seven (p.17), Nine (p.21), and Fourteen (p. 32), the indictment charges that defendant National Dairy entered into conspiracies with one or another of its distributors and "others to the grand jury unknown." If the Government intends to prove that there were in fact such other conspirators, it seems inconceivable under the circumstances that they are to the Government unknown. Again, defendants cannot wait until the trial to learn if these "others" are among the "out-of-State dairies," "small" dairies," or are of some entirely different classification. (3) Repeatedly, the indictment alleges a "continuing agreement, understanding, and concert of action" with respect to prices. It is entirely unclear in each case whether the charge is one of express agreement or of some kind of implied agreement or "conscious parallel action," and this, combined with the artfully indefinite identification of the alleged co-conspirators and the charge that defendant National Dairy

sold at unreasonably low prices which may or may not be charged to be conspiratorial), leave defendants with [fol. 39] little more information than that they are charged with violating the Sherman and Robinson Patman Acts.

Defendants expect to file motions attacking the sufficiency of the indictment and, as a result of the Government's failure to comply with the letter or the spirit of the Court's Order that it state the "underlying facts" on which it relies it is clear that defendants will be forced also to file discovery motions including a motion for a bill of particulars under Rule 7(f). As a further result, in the Tentative Statement defendants are able to set forth only in general terms the underlying facts apparent to them at this time.

I

The Underlying Facts Apparent to Defendants at This Time

1. *Industry background.* In order to put the charges of the indictment in proper perspective it should be recognized at the outset that defendant National Dairy, selling to homes as well as to stores, handles a relatively small proportion—perhaps 10%—of the milk sold in the greater Kansas City area. It should be recognized also that this proportion has gradually declined over the years. One reason for this has been the gradual shift in the distribution of milk from sale and delivery at the home to "cash and carry" sales through retail food and dairy stores. As National Dairy's home delivery business declined it was not able to make compensating gains in sales to stores.

It should also be recognized that the milk produced by National Dairy's Kansas City plant is not uniformly distributed to outlying towns and rural areas. Such distribution is made by a distributor-customer of National Dairy, ordinarily only in his home town and such part of the immediately surrounding area as he finds it desirable and economical to serve. The western Missouri areas served by different distributors are geographically segregated and in many sections thereof the fluid milk products [fol. 40] of National Dairy receive no distribution. (Two

distributors sell a small amount of milk in eastern Kansas communities surrounding Paola and Lewisburg.)

During the period of time and in the geographic areas which appear to be covered by the indictment, the milk industry as a whole has felt the impact of the shifting pattern of retail distribution of foods generally. This period has seen an important part of the rise of the larger supermarket operated by corporate food chains, individuals affiliated with cooperative chains or wholesale grocery companies, (as well as independent individuals) and the shopping center. The proportion of fluid milk products handled by the supermarkets has steadily increased, while that handled by neighborhood grocery stores and the home delivery routes of the dairy companies has steadily declined. As a result, competition among dairy companies for the supermarket business, and among the supermarkets for the business of consumers, has been intense. At the same time, dairies with home delivery service (including defendant National Dairy) have done their best to remain competitive in this phase of their businesses.

In the forefront of this vigorous competition, Adams Dairy Company of Blue Springs, Missouri, serving numerous large supermarkets, including those of the principal food chains, and having no home delivery service, has aggressively promoted its sales through stores by offering low prices and special inducements such as free merchandise, "two-for-one" sales, coupons entitling consumers to receive specified amounts off of the usual retail price of Adams products, and the like. Adams has also carried on large scale newspaper advertising campaigns, principal features of which have been to emphasize (1) the lower prices available to the consumer by purchasing through [fol. 41] stores rather than by home delivery, and (2) the leading part which Adams has played in widening the price differential as between store and home-delivered milk.

As Adams obtained the milk business of additional supermarkets in the greater Kansas City area and in outlying Kansas and Missouri towns, and thus achieved progressively wider distribution, its merchandising tactics gradually became the most important single competitive factor in the milk business. And as Adams' sales expanded, the

market remaining open to competition by other dairies became gradually smaller. Illustrative of the competitive importance of Adams' practices in the milk industry in the geographical areas and during the period of time covered by the indictment is the fact that hearings have been held with respect thereto by Committees of both houses of Congress, and the Federal Trade Commission recently has issued complaints attacking Adams' practices as unfair methods of competition.

During the period of time covered by the indictment, other dairies, principally smaller ones, in order to obtain or to expand their participation in the burgeoning "cash and carry" milk business, or in order to meet competition, likewise have relied upon the appeal of cut prices. Some of these featured sales of milk in glass gallon containers ("gallon jugs"); others featured low prices in glass half-gallon containers or in the more popular half-gallon paper container. While the proportion of the total milk business accounted for by these dairies was relatively small, the impact of their cut prices on the general price level was substantial.

At the retail level, some stores featured reduced milk prices which reflected low wholesale prices from their suppliers, while others from time to time featured special low prices which reflected sales at cost or as "loss leaders." [fol. 42] 2. *National Dairy's prices.* As the result of low retail prices on Adams' and other brands of milk (including milk in gallon jugs), constant pressure was exerted upon defendant National Dairy by its store customers for lower wholesale prices (which were available from other suppliers) so that these customers might be competitive at the retail level. Until about August of 1958, knowing from experience that it would lose its store-customers, if it was not competitive in its pricing, defendant National Dairy followed the policy of making price reductions ("spot prices") to individual stores wherever there was cut price competition which could be traced to a reduced wholesale price of another dairy. Other dairies appear to have followed a similar policy. The result during 1957 and 1958 was a chaotic pricing situation. By June of 1958 the bulk of National Dairy's sales to stores in the Kansas City area were being made at "spot prices."

In addition, price changes were sudden and drastic. For example, where Adams cut on a two-for-one sale for one or more stores in a particular area, wholesale prices of all dairies to their store customers in the same area were cut in half. This price reduction might and frequently did spread to other areas. A similar result ordinarily followed when a group of stores ran a sale on milk independent of any price concession by its supplier. As a result, substantial financial losses were suffered by all dairies, large as well as small.

There is no doubt that this situation led to conversations from time to time between or among personnel of various dairy companies (some with and some without participation by National Dairy personnel) concerning the desperate plight of the industry. But neither National Dairy nor Raymond J. Wise, jointly or severally, made agreements or entered into any express or implied understandings with competitors. They specifically deny that they entered into any of the conspiracies to fix prices or to [fol. 43] eliminate competition charged in the Sherman Act counts of the indictment.

The evidence will show that National Dairy personnel made strong efforts, at great expense in time and money, to determine what competitive wholesale prices were from time to time, and that they endeavored at all times to set their prices at—not below—competitive levels. While these levels were sometimes low, National Dairy had no choice but to charge competitive prices or to withdraw completely from the competitive race.

Thus National Dairy did not institute price wars; it became involved in them, along with all other competitive dairies, as the result of having to meet low prices offered by others. National Dairy did not continue or "keep in existence" price wars by whomever started, either by agreement with competitors or independently, for the purpose of destroying competition or for any other purpose. National Dairy's efforts to meet competition in order to maintain its business do not evidence either conspiracy in violation of the Sherman Act or an intent to destroy competition in violation of Section 3 of the Robinson-Patman Act.

In six counts[1] of the indictment it is charged that among the terms of the conspiracies between National and each of six distributors are:

"(a) That [distributor] sell milk to stores at prices agreed upon with National;

[fol. 44] "(b) That National guarantee [distributor] a specific gross margin or profit on his sale of milk to stores at the prices agreed upon with National;"

These charges reflect a misinterpretation of the formula used by National Dairy for establishing the prices at which it sold to its distributors. National's price to the distributor was a dock price computed on the basis of a given number of cents per item[2] below the going wholesale price (*i.e.* the prevailing price to the storekeepers in the distributor's area. Thus the going price to stores in a distributor's area was simply used as an index from which National Dairy's price to the distributor was computed. This is a widely used practice in the dairy industry, and is very similar to the practice in other industries (*e.g.* drugs, electrical appliances, automobiles) of selling to distributors at a given percentage off the suggested resale price.

Under National Dairy's arrangement with these distributors they were free to and did sell dairy products bought from National Dairy at such prices, and on such terms and conditions as they saw fit. However, if a distributor charged a price lower than the prevailing wholesale price, his pay price to National Dairy would not be reduced. The price he paid was based on the market level, not on the distributor's own resale price. Moreover, it was a condition of the arrangement that if, through a price cut initiated by him, a distributor touched off a general reduction in the prevailing price to stores, his pay price [fol. 45] to National Dairy would not be reduced correspondingly;

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[1] Count One, par. 17; Count Three, par. 29; Count Five, par. 41; Count Seven, par. 53; Count Nine, par. 65; Count Fourteen, par. 99

[2] Ordinarily 2½¢ per "point" where a quart of milk is one point, a half-gallon is two points, etc.

he would have to operate on the reduced margin and stand any losses himself. This is the antithesis of the "guaranteed margin" charged in the indictment.

As a practical matter the distributors generally sold to stores at the prevailing wholesale list prices in their areas, but this was not the result of any agreement with National Dairy. It resulted simply because their products did not command a higher price than those of their competitors; if they attempted to sell below prevailing list prices, their competitors would meet their lowered prices. This is a fact of life in the milk industry and one which has been recognized by the courts.

Where a price reduction or price war developed in an area served by a distributor, National Dairy investigated to make sure that its distributor had not initiated the reduction. Only when it was assured that its distributor had not undersold the market did it reduce its price to the distributor, and only then did the distributor ordinarily reduce his resale price. Thus with its distributor customers as well as with the store customers served on its own routes, National Dairy followed a scrupulously careful, independent price policy.

These facts evidence neither conspiracy nor sales at unreasonably low prices to destroy competition.

[fol. 46] 3. *Interstate Commerce.* In the statement of legal principles relied upon by defendants which follows, it is pointed out that Counts Three (p. 10), Five (p. 14), Seven (p. 17) Nine (p. 21), and Fourteen (p. 32) of the indictment do not charge (a) transactions in interstate commerce, or (b) an effect upon interstate commerce sufficient to confer jurisdiction under the Sherman Act; and that Counts Two (p. 9), Four (p. 13), Six (p. 16), Eight (p. 20), Ten (p. 24) and Fifteen (p. 34) fail to charge transactions in the course of interstate commerce sufficient to confer jurisdiction under the Robinson-Patman Act. The evidence will show that, at the times here pertinent, defendant National Dairy's Kansas City, Missouri plant purchased all of its raw milk from a farmers' cooperative located at Butler, Missouri. This cooperative received milk complying with certain standards of purity, largely from Missouri milk producers, cooled and stored it, and sold only a portion thereof to the Kansas City plant of National

Dairy. This milk was standardized, pasteurized, homogenized, fortified with vitamins, and packaged within the State of Missouri. Packaged milk sold to National Dairy distributors was delivered to them at their docks in various Missouri towns by contract haulers, except that Merle Martin, distributor at Paola, Kansas (as admitted in the indictment, par. 11) purchased and picked up his milk in his own truck at National Dairy's Kansas City, Missouri plant.[3] Milk distributed by defendant National Dairy on its own routes was delivered in the Greater Kansas City area, including a small part thereof in Kansas City, Kansas.

[fol. 47]

II

Legal Principles Relied Upon by Defendants

A. The Sherman Act Counts

Eight counts of the indictment undertake to charge violations of Section 1 of the Sherman Act. (Counts One, p. 1; Three, p. 10; Five, p. 14; Seven, p. 17; Nine, p. 21; Eleven, p. 25; Twelve, p. 28; and Fourteen, p. 32). Among the legal principles pertinent to these counts are three basic requirements which the Government must meet: (1) it must be shown that interstate commerce was restrained; (2) the conspiracies charged must be established by actual evidence; and (3) it must be shown that the conduct alleged constitutes unreasonable restraint of trade.

1. *Interstate Commerce.* This case involves primarily a one-state situation. The Government's Tentative Statement acknowledges that the alleged conspiracies were "at a localized level." Although the Government seeks to minimize the effect of this admission, the issue of interstate commerce is clearly of first-rank importance. The Sherman Act cannot apply unless the interstate commerce requirement is met.

To meet this requirement, the Government must allege and show either (1) that the restraints were committed in interstate commerce, or (2) that the restraints had a

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[3] National Dairy's transactions with Merle Martin are attacked in Counts One (p. 1) and Two (p. 9).

substantial and direct effect on interstate commerce. *United States* v. *Yellow Cab Co.*, 332 U. S. 218 (1947); *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U. S. 219 (1948).

Neither the indictment nor the Government's Tentative Statement indicates which of these facets of the commerce requirement is intended to be met. In the charging paragraph of each count, the indictment merely alleges that the defendants and co-conspirators engaged in alleged conduct "in unreasonable restraint of the aforesaid trade and [fol. 48] commerce." There is no direct allegation that the restraints were committed in interstate commerce itself, and on the other hand there are no allegations of effect upon interstate commerce. These counts of the indictment are thus subject to the serious objection of extreme vagueness with respect to a key part of the offenses alleged.

The authorities are clear that the commerce requirement cannot be satisfied by mere presumptions based on the fact that the defendant National is a large concern doing business in many states, nor on the fact that a portion of the processed milk which it sells in Missouri originated as raw milk in Kansas. The one case cited in the Government's Tentative Statement, *Lebaron* v. *United States*, 291 U. S. 297 (1934), did not hold that the issue of interstate commerce can be disposed of summarily. On the contrary, the Court based its conclusion on specific evidence and stated that

> "The evidence shows that they and other defendants conspired to burden the free movement of live poultry into the metropolitan area."

The Court further stated:

> "The interference by appellants and others with the unloading, the transportation, the sales by marketmen to retailers, the prices charged and the amount of profits exacted operates substantially and directly to restrain and burden the untrammeled shipment and movement of the poultry while unquestionably it is in interstate commerce." (291 U.S. at 297)

remembered that mere uniformity of action in a market place, as the Supreme Court has emphasized, does not establish conspiracy. *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537 (1954).

[fol. 50] Moreover, the Court of Appeals of this Circuit has held that mere proof of uniformity of prices and proof of simultaneous price movements in milk do not establish a conspiracy for Sherman Act purposes. In *Peerless Dairy Co. v. United States*, 178 F. 2d 363 (8th Cir. 1949), cert. denied 339 U.S. 942 (1950), the court reversed the conviction of two dairy companies on charges of conspiring to fix milk prices in the St. Louis area. The court based its holding upon the failure of the Government to prove a conspiracy. It stated:

> "The milk as handled by appellants was a standardized product. Its cost items being substantially identical for both appellants, uniformity in price would result from economic forces. Economists called as expert witnesses testified that in a market such as the fluid milk market in St. Louis, where there were standardized major cost factors, uniformity of price is to be expected."

Accordingly, the court stated:

> "We are clear that mere uniformity of prices in the sale of a standardized commodity such as milk is not in itself evidence of a violation of the Sherman Anti-Trust Act."

3. *Nature of Restraints Charged.* The Government in its Tentative Statement makes the sweeping statement that each of the Sherman Act counts sets forth so-called "hard core" price fixing charges constituting clearly illegal *per se* activities.

It may be acknowledged that a charge of agreement between National Dairy and its competitors upon their respective selling prices for milk charges a kind of violation which might be a *per se* offense, if proved. However, Counts One (p. 1), Three (p. 10), Five (p. 14), Seven (p. 17), Nine (p. 21) and Fourteen (p. 32) involve no such charges. In

these counts, the indictment alleges separate agreements between National and various of its distributors with respect to the resale prices and policies of the latter.

[fol. 51] Even if such agreements had been made with distributors, which defendants deny, they would not amount to *per se* violations as claimed by the Government. Not all agreements on price are "price fixing" agreements within the meaning of the *per se* doctrine of the Sherman Act. For example, the agreement between a seller and a buyer as to the contract price of goods to be sold and delivered is certainly not an illegal price fixing agreement. Yet the allegation (*e.g.* Paragraph 17 (b)) that National guaranteed its distributor a specific margin of profit is nothing but a mysterious sounding way of describing a simple and innocuous contractual arrangement between National and its distributor customers covering the contract price of milk as between National Dairy as seller and the distributor as buyer.

Similarly, the charge (as in Paragraph 17 (a)) that National and each distributor agreed upon the prices which the distributor would charge to its customers asserts only a simple, isolated vertical price agreement, which is far different from the price fixing among competitors covered by the *per se* rule. While so called "resale price maintenance" agreements may be brought within the price fixing rule where a series of such agreements produces a horizontal elimination of competition among competing dealers, as in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), no such price fixing scheme is alleged in these counts. Unlike the dealers typically involved in illegal resale price maintenance plans, the distributors of National each operated in a different territory and were not in competition with each other. Vertical agreements in this situation thus would not eliminate price competition and do not fall within the *per se* rule.

Finally, the other allegations of Paragraph 17 and similar allegations of other counts also merely allege agreement between National and a given customer, rather than between National and competitors. While such agreements may be unlawful if proved to have been made with an illegal [fol. 52] purpose or if proved to have had an unreasonable

effect on competition, they are no more within the *per se* price fixing rule than the other allegations of these paragraphs.

B. *The Robinson-Patman Act Charges*

Under the charges based upon Section 3 of the Robinson-Patman Act, the Government has the burden of proving that the challenged sales were made (1) in interstate commerce, (2) at unreasonably low prices, (3) with the intent of destroying competition. In addition to their defenses upon the facts, defendants contend that Counts Two (p. 9), Four (p. 13), Six (p. 16), Eight (p. 20), Ten (p. 24) and Fifteen (p. 34) of the indictment do not sufficiently charge that the challenged transactions took place in the course of interstate commerce; that Section 3 is unconstitutional; and that Count Thirteen (p. 31) of the indictment does not charge a violation of Section 3 as to defendant Wise.

1. *Interstate Commerce Issue.* Section 3 of the Robinson-Patman Act confers jurisdiction over the acts there specified only when those acts are done by persons engaged in interstate commerce and in the course of such interstate commerce. Accordingly, the fact that defendant is engaged in interstate commerce does not alone provide the requisite basis for jurisdiction. As the Supreme Court stated in dealing with the related civil section (Sec. 2 (a) of the Clayton Act as amended by the Robinson-Patman Act): "In order for the sales here involved to come under the . . . act, they must have been made in interstate commerce." *Standard Oil Company* v. *F.T.C.*, 340 U.S. 231, 236-237 (1951). This is an even stricter requirement than the interstate commerce requirement of the Sherman Act, under which, as pointed out above (p. 11), it is sufficient if it is shown that a restraint had a substantial and direct effect upon interstate commerce.

To show jurisdiction the government relies on the claim that some raw milk (about 10% of the milk bought by the [fol. 53] cooperatives) was imported from Kansas to a cooperative in Missouri. In the storage tanks of the cooperative the milk was commingled with milk originating in Missouri. A part of this milk was sold to defendant National Dairy to be processed in its processing plant in Missouri. Thereafter, processed items in packaged form were sold by National Dairy to its distributor and store-

customers within the State of Missouri. This, we contend, does not establish a "flow of milk in interstate commerce," and the sales in question were not made "in the course of such commerce."

It is well settled that the importation of raw materials is not enough to characterize subsequent local sales of products manufactured therefrom as interstate sales. Whatever the origin of the raw materials, production or processing breaks the stream of commerce; sales of a finished product from a production plant to customers in the same state are intrastate sales. *Marks Food Corporation v. Barbara Ann Baking Co.*, 162 F. Supp. 300 (D.C. S.D. Calif. 1958); *Mercers v. Shell Oil Co.*, 96 F. Supp. 670, 675-676 (D.C. S.D. Calif. 1951); *Samuel Shlomchik v. Hirshgrade Bakery Co.*, CCH Trade Reg. Rep. (1952-1953 Trade Cas.) Para. 67, 632 (D.C. E.D. Pa. 1953); *Lawson v. Woodmere*, 217 F. 2d 148 (4th Cir. 1954) and cases there cited; *U.S. v. French Baker*, 48 F. Supp. 260 (D.C. S.D. Ohio, 1942), appeal dismissed 318 U.S. 795 (1943); *H. P. Hood & Sons v. Commonwealth*, 127 N. E. 497, 499, 235 Mass. 572 (1920).

The transformation of milk from its raw state into the various milk products is, as the evidence will show, a true production process. Milk that, as a result of the pasteurization process, is safe to drink and lawful to sell, that has been standardized, homogenized, fortified with vitamins, and packaged, differs physically and chemically from the raw milk brought from the farm for processing. *See H. P. Hood & Sons, supra.* Consequently, we contend, the processing of milk falls within the rule of the above cited cases; it breaks the stream of commerce. The local sale of processed milk is an intrastate sale.

[fol. 54] Here, however, it is our contention that the milk from Kansas had left the stream of commerce even before it reached defendant's processing plant. It did so in the storage tanks of the cooperative, where it was intermingled with the milk originating intrastate and was thereafter indistinguishable from it. The sales in question were at least two steps removed from interstate commerce and, therefore, we submit, are not cognizable under the Robinson-Patman Act. *Cf. U. S. v. St. Louis Dairy Co.*, 77 F. Supp. 853, 859 (E.D. Mo. 1948) rev'd on other grounds,

Peerless Dairy Co. v. U.S., 178 F. 2d, 363 (8th Cir. 1949) cert. denied, 339 U.S. 942 (1950), in which the Court, in finding interstate commerce considered as determinative defendants' "control of the product from purchase in one state to delivery in another.")

2. *The Issue of Constitutionality.* The portions of Section 3 of the Robinson-Patman Act here involved are the following:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, . . . to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor."

Neither in the Robinson-Patman Act nor elsewhere is there provided any standard by which to determine whether a price is "unreasonably low." As in *U.S. v. L. Cohen Grocery Co.*, 255 U.S. 81 (1921), in which the Supreme Court struck down the Lever Act (prohibiting the wilful and felonious making of unjust and unreasonable rates and charges for necessities), the clause in question here is unconstitutional because it does not provide "an ascertainable standard of guilt . . . adequate to inform persons accused of violation thereof of the nature and cause of the accusation against them." 255 U.S. at 89.

Despite the decision of Judge Yankwich quoted at length in the Government's Tentative Statement (*F & A Ice Cream Co. v. Arden Farms Co.*, 98 F. Supp. 180 (D.C. S.D. Calif. [fol. 55] 1951), a decision which turned out to be dictum and was not appealed[1], no court has since considered the question settled. (*See Report of the Attorney General's National Committee to Study the Antitrust Laws*, p. 139.) On the contrary, only last year the Supreme Court, holding that no private action could be brought for violation of

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[1] The decision on the merits was for the defendant and never reached the problem of the reasonableness of the prices charged. *Italian Ice Cream Co. v. Arden Farms Co.*, 104 F. Supp. 796 (D.C. S.D. Calif. 1952), aff'd 231 F. 2d 356 (9th Cir. 1955), cert. den. 350 U.S. 991 (1956).

Section 3 of the Robinson-Patman Act", said of the "unreasonable low prices" provision (*Nashville Milk Co. v. Carnation Company*, 355 U.S. 373, 377-378 (1958)):

> "It is not an idle conjecture that the possibility of abuse inherent in a private cause of action based upon this *vague provision* was among the factors which led Congress to leave the enforcement of the provisions of § 3 solely in the hands of the public authorities . . ." [Emphasis added]

And it added (355 U.S. at 378, n. 7):

> "The District Court indicated that the vagueness of the 'unreasonably low prices' provision might give rise to constitutional difficulties, if such questions had to be faced. Cf. *United States* v. *L. Cohen Grocery Co.*, 255 U.S. 81, *Cline* v. *Frink Dairy Co.*, 274 U.S. 445. See Comment, 55 Mich. L. Rev. 845, 853-856."

In the companion case, *Safeway Stores* v. *Vance*, 355 U.S. 389 (1958), Judge Rogers had written (137 F. Supp. 841, 845 (D.C. N.M., 1956)): "A thorough study of the statute in question, and the authorities pertinent thereto, have implanted in the Court's mind grave doubts as to the constitutionality of Section 3 of the Robinson-Patman Act . . ."

Defendants will welcome the opportunity to demonstrate in a thorough briefing of the question that *Fat Al Ice Cream* [fok. 56] decision is wrong both in its economic assumptions and its legal rationale. The "unreasonably low prices" clause of Section 2 of the Robinson-Patman Act is governed by those cases that have held reasonableness to be a shifting, vague, and unworkable — in short, unconstitutional — standard in complex and speculative economic situations. *United States* v. *L. Cohen Grocery Co.*, 255 U.S. 81 (1921); *International Harvester Company* v. *Commonwealth of Kentucky*, 234 U.S. 216, 221 (1914) ("market value under fair competition, and under normal market conditions");

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[56] Thus negating another of Judge Yankwich's holdings in the same case: *Balian Ice Cream Co.* v. *Arden Farms Co.*, 94 F. Supp. 796 (D.C. Calif. 1951).

Cline v. Frink Dairy Company, 274 U.S. 445 (1927) ("reasonable profits"); *Connally v. General Construction Company*, 269 U.S. 385, 391-394 (1926) ("current rate of per diem wages in the locality"). The fact that the thing forbidden by the clause here in issue cannot be definitely ascertained is not changed by the requirement of showing a particular intent: "... wilful conduct cannot make definite that which is undefined. *Screws v. U.S.*, 325 U.S. 91, 105 (1945); note that the Lever Act required scienter: *U.S. v. L. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921). Particularly is this true in the case of Section 3 of the Robinson-Patman Act where the prohibited motive differs, at best, only in degree from the normal economic motive in our competitive society, a motive that is considered to be not only lawful, but eminently desirable.

3. *Count Thirteen Fails to Charge a Violation of Law As To Defendant Raymond J. Wise.* Count Thirteen charges (par. 91) that defendant Wise "authorized or ordered to be done some or all of the acts alleged in this count . . . to have been done by National." It further charges (par. 92) that "National, acting through its officers and directors, including defendant Wise . . . sold milk . . . at unreasonably low prices for the purpose of destroying competition . . . in violation of Section 3" of the Robinson-Patman Act. Thus defendant Wise is not himself charged with selling at low prices in violation of Section 3, but with having "authorized or ordered" some or all of the acts charged against defendant National.

[fol. 57] This charge states no violation of law as to defendant Wise unless it can be said to do so under Section 14 of the Clayton Act (15 U.S.C. § 24) which provides:

> "Sec. 14 [38 Stat. 736; 15 U.S.C. § 24.] Whenever a corporation shall violate any of the penal provisions of the *antitrust laws*, such violation shall be deemed to be also that of the individual directors, officers, or agents of such corporation who shall have authorized, ordered, or done any of the acts constituting in whole or in part such violation, and such violation shall be deemed a misdemeanor, and upon conviction therefor of any such director, officer, or agent he shall be punished by a fine of not exceeding $5,000 or by imprison-

ment for not exceeding one year, or by both, in the discretion of the court." [Emphasis supplied]

But this provision has no application to violation by a corporation of Section 3 of the Robinson Patman Act since Section 3, as recently held by the Supreme Court, is not a part of the "antitrust laws." *Nashville Milk Co. v. Carnation Company*, 355 U.S. 373 (1958).

Respectfully submitted, /s/ John T. Chadwell, /s/ Richard W. McLaren, /s/ Henry W. Buck, /s/ William Hoffstot, Jr., Attorneys for Defendants, National Dairy Products Corporation and Raymond J. Wise.

November 13, 1959

Of Counsel: Snyder, Chadwell, Keck, Kayser & Ruggles, 135 South LaSalle Street, Chicago 3, Illinois. Telephone: RAndolph 6-2545. Morrison, Hecker, Buck & Gozad, 17th Floor, Bryant Building, Kansas City 6, Missouri. Telephone: VIctor 2-5910.

Copy of the foregoing Defendants' Tentative Statement of Underlying Facts and Legal Authorities mailed to Earl A. Jinkinson, Attorney for the United States, 219 S. Clark St., Chicago 4, Illinois, this 12th day of November, 1959.

Richard W. McLaren, Attorney for Defendants, National Dairy Products Corporation and Raymond J. Wise.

[fol. 58] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION

[Title omitted]

MOTIONS OF DEFENDANT, NATIONAL DAIRY PRODUCTS CORPORATION TO DISMISS CERTAIN COUNTS OF THE INDICTMENT, TO STRIKE CERTAIN MATERIAL FROM THE INDICTMENT, AND FOR PARTICULARS OF CERTAIN ALLEGATIONS OF THE INDICTMENT—Filed January 22, 1960.

I

Motions to Dismiss Certain Counts of the Indictment

A. Defendant, National Dairy Products Corporation, moves the Court for an order dismissing Counts Two (p. 9), Four (p. 13), Six (p. 16), Eight (p. 20), Ten (p. 24), Thirteen (p. 31), and Fifteen (p. 34 of the indictment upon the ground that the portion of Section 3 of the Robinson-Patman Act (15 U.S.C. § 13 a) under which defendant is charged in each of said counts is unconstitutional.

B. In the alternative, defendant, National Dairy Products Corporation, moves the Court for an order dismissing Counts Two (p. 9), Four (p. 13), Six (p. 16), Eight (p. 20), Ten (p. 24) and Fifteen (p. 34) upon the ground that said counts fail to charge an offense under Section 3 of the Robinson-Patman Act (15 U.S.C. § 13 a).

C. Defendant, National Dairy Products Corporation, moves the Court for an order dismissing Counts One (p. 1), Three (p. 10), Five (p. 14), Seven (p. 17), Nine (p. 21), [fol. 59] and Fourteen (p. 32) upon the ground that said counts fail to charge an offense under Section 1 of the Sherman Act (15 U.S.C. § 1).

II

Motions to Strike Certain Allegations of the Indictment

A. Defendant, National Dairy Products Corporation, moves the Court for an order striking from Count Eleven

(p. 23) and Count Twelve (p. 31) of the indictment as surplusage the following:

(1) the first five sentences (line 1 through the word "employees" in line 9) of paragraph 5, and

(2) all of paragraph 13.

as the same are incorporated by reference in Counts Eleven and Twelve by paragraphs 74 and [illegible] of the indictment, respectively.

B. If its motion 1 A based upon the unconstitutionality of the portion of Section 3 of the Robinson Patman Act here involved should be denied, and if its motion 1 B to dismiss certain Robinson Patman Act counts for failure to charge an offense should be denied in whole or in part, such that a trial must be had on any of the Robinson Patman Act counts (Counts Two, p. 9; Four, p. 13; Six, p. 16; Eight, p. 20; Ten, p. 24, Thirteen, p. 31, and Fifteen, p. 34), then as to each of such counts to be tried, defendant National Dairy Products Corporation moves the Court in the alternative for an order striking from such counts as surplusage the following:

(1) the first five sentences (line 1 through the word "employees" in line 9) of paragraph 5; and

(2) all of paragraph 13.

as the same are incorporated by reference in the Robinson [fol. 60] Patman Act counts to be tried by one or more of paragraphs 21, 23, 45, 57, 69, 90 and 103; and

(3) the words "the advantages it possesses by reason of the fact that it operates in a great many different geographical localities in order to finance and subsidize" and the words "it and" (as the same appear in the phrase "in competition with *it and* its distributor") from paragraphs 23, 35, 47, 59, 71, 93 and 105.

If its motion 1A should be denied such that a trial must be had upon Count Thirteen (p. 31), then defendant National Dairy Products Corporation moves the Court in the alternative for an order striking from paragraph 95 the words "and the co-conspirators" on the ground that the same are surplusage.

C. If its motion IC to dismiss certain Sherman Act counts (Counts One, p. 1; Three, p. 10; Five, p. 14; Seven, p. 17; Nine, p. 21, and Fourteen, p. 32) for failure to charge an offense should be denied in whole or in part, such that a trial must be had upon any of said counts, then as to each of such counts to be tried, defendant, National Dairy Products Corporation, moves the Court in the alternative for an order striking from such counts as surplusage the following:

(1) the first five sentences (line 1 through the word "employees" in line 9) of paragraph 5, and

(2) all of paragraph 13,

as the same appear or are incorporated by reference in the said Sherman Act counts to be tried by one or more of paragraphs 26, 38, 50, 62 and 96; and

(3) the words "financed by the resources of National" from paragraphs 19(b), 31(b), 43(b), 55(b), 67(b) and 101(b).

[fol. 61] III

Motion for Particulars of Certain Allegations of the Indictment

Defendant, National Dairy Products Corporation, moves the Court for an order directing the United States of America to serve on said defendant and to file with the Court a bill of particulars, to the extent that said particulars are now known to the United States, of certain allegations of the indictment.

Defendant requests particulars as to Counts Eleven and Twelve, and in the alternative, if or to the extent that its motions (IA, IB and IC, above) to dismiss Counts One through Ten and Thirteen through Fifteen should be denied, such that trial must be had on one or more of said counts, then as to each of such counts to be tried, as follows:

Particulars Requested with Respect to Introductory Allegations

1. As to paragraph 2 of Count One of the indictment and as to the said paragraph as realleged in Counts Two, par. 21; Three, par. 26; Four, par. 33; Five, par. 38; Six, par. 45;

Seven, par. 50; Eight, par. 57; Nine, par. 62; Ten, par. 69; Eleven, par. 74; Twelve, par. 82; Thirteen, par. 90; Fourteen, par. 96; and Fifteen, par. 103, name each officer, director, agent and employee of defendant National (other than the individual defendant) who it is claimed authorized, ordered or did the acts alleged in each count of the indictment to have been done by defendant National.

2. As to paragraphs 4(k), 4(l) and 7 of Count One of the indictment and as to said paragraphs as realleged in Counts Two through Fifteen in the manner described above, identify each "Out-of-State Dairy" and each "Small dairy" [fol. 62] with which it is claimed National competed in the Missouri-Kansas area for the past several years.

3. As to paragraph 11 of Count One of the indictment and as to the said paragraph as realleged in Counts Two through Fifteen in the manner described above,

a. Identify by name and address each co-operative from which it is claimed National purchased milk "during the past several years, and give the location or locations from which each is claimed to have shipped milk to National's Kansas City, Missouri plant.

b. Identify by name and address each other person, firm and corporation, if any, from which it is claimed National purchased milk "during the past several years," and give the location or locations from which each is claimed to have shipped milk to National's Kansas City, Missouri, plant.

c. As to each co-operative, firm or person named in response to paragraphs a and b, above, state what percentages of the commingled milk sold by each National is claimed to have been produced (1) on farms in Kansas, and (2) on farms in Missouri.

4. As to paragraph 12 of Count One of the indictment and as to the said paragraph as realleged in Counts Two through Fifteen in the manner described above,

a. Identify each dairy or other seller which sold milk in the (1) Lexington, Missouri; (2) Sedalia, Missouri; (3) Mexico, Missouri; (4) Glasgow, Missouri; (5) Butler, Missouri, market or markets which milk allegedly came from or had been commingled with milk coming from farms located in the State of Kansas.

b. Identify each dairy or other seller which sold milk in the Paola-Osawatomie, Kansas, market which milk [fol. 63] allegedly came from or had been commingled with milk coming from farms located in the State of Missouri.

Allegations of Counts Eleven and Twelve (Sherman Act Counts With Respect To The Greater Kansas City Market)

5. As to paragraphs 76 and 77 of Count Eleven and paragraphs 84 and 85 of Count Twelve:

a. Name each person, firm and corporation not named as a defendant who it is claimed participated as a co-conspirator with defendants National and Wise in the offense charged.

b. Describe how and in what manner each alleged co-conspirator is claimed to have participated in the alleged conspiracy, specifying with respect to each co-conspirator each act performed, statement made and meeting attended in furtherance of the alleged conspiracy, and the date and place of each such act, statement or meeting. In the case of each alleged corporate co-conspirator, name the natural person or persons claimed to have performed each such act or made such statement.

6. As to paragraph 78 of Count Eleven:

a. State whether the alleged "continuing agreement, understanding, and concert of action" had any terms other than those listed in said paragraph of the indictment, and if so, state each such other term.

b. State whether any of the terms of the alleged "continuing agreement, understanding, and concert of action" were the subject of express agreements, and if so, state the date and place each such express agreement was made and the person or persons making such agreement on behalf of defendant National and each alleged co-conspirator; [fol. 64] to the extent that the alleged "continuing agreement, understanding, and concert of action" or any term thereof are implied from acts or statements or meetings held, specify for said continuing agreement, understanding, and concert of action and for each such term the acts, meetings and statements from which each is implied, in-

cluding the date and place and the person or persons who participated in each such act or meeting or in the making of each such statement.

c. Identify the "certain discount" allegedly offered by Meyer Sanitary Milk Company to Milgram Food Stores.

d. Identify each of the "small dairies" which allegedly were selling milk in glass gallon containers.

e. Specify "the price differential" referred to in paragraph 78(a)(2) and state the approximate period of time when the same was in effect, and if such differential is claimed to have been narrowed, state what it was originally and when and to what extent it was narrowed.

7. As to paragraph 80 of Count Eleven and paragraph 88 of Count Twelve:

a. Specify "the selling price" of milk sold in glass gallon containers before and after it was allegedly increased, giving the periods during which such prices are claimed to have been in effect.

b. State how and in what manner the sale of milk in glass gallon containers allegedly was restricted.

c. Identify the "small dairies" which allegedly were caused to sell milk at a loss, specifying the prices at which they sold, the period during which such sales are claimed to have been made at a loss, and the unit costs to such small dairies of milk in the various container sizes handled by them during such period.

[fol.] d. Identify the "small dairies" which allegedly were caused to suffer severe financial losses.

e. Specify the milk prices allegedly "prevailing before the aforesaid combination and conspiracy," and those higher prices to which they were allegedly raised, identifying the dairies which sold at such prices.

f. State whether the alleged conspiracy had any effects other than those listed in said paragraphs, and if so, state (separately for each paragraph) each other claimed effect, and identify the person or persons claimed to have been affected.

8. As to paragraph 86 of Count Twelve:

a. Particulars as requested in paragraph 6a, 6b and 6d of this motion with respect to paragraph 78 of Count Eleven.

b. Specify the milk prices in effect immediately before

and immediately after they were allegedly (1) lowered about July 14, 1958; (2) raised about August 27, 1958; and (3) raised about October 1, 1958.

In the Alternative, Particulars Requested With Respect To Allegations of Counts One, Three, Five, Seven, Nine and Fourteen (Sherman Act Counts Involving Distributors)

9. As to paragraph 16 of the indictment

a. Identify each person, firm and corporation not named as a defendant (other than the named distributor) who it is claimed participated as a co-conspirator with defendant National in the offense charged.

b. Describe how and in what manner each alleged co-conspirator is claimed to have participated in the alleged conspiracy, specifying with respect to each co-conspirator each act performed, statement made and meeting attended [fol. 66] in furtherance of the alleged conspiracy, and the date and place of each such act, statement or meeting. In the case of each alleged corporate co-conspirator, name the natural person or persons claimed to have performed each such act or made such statement.

10. As to paragraph 17 of the indictment

a. State whether the alleged "continuing agreement, understanding, and concert of action" had any terms other than those listed in said paragraph of the indictment, and if so, state each such other term.

b. State whether any of the terms of the alleged "continuing agreement, understanding, and concert of action" were the subject of express agreements, and if so, state the date and place each such express agreement was made and the person or persons making such agreement on behalf of defendant National and each alleged co-conspirator; to the extent that the alleged "continuing agreement, understanding, and concert of action" or any term thereof are implied from acts or agreements or meetings held, specify for said continuing agreement, understanding, and concert of action and for each such term the acts, meeting and statements from which each is implied, including the date and place and the person or persons who participated

in each such act or meeting or in the making of each such statement.

e. Specify each of the prices of milk from time to time which allegedly were agreed upon by the named distributor and defendant National.

d. Define the phrase "specific gross margin of profit" as used in this paragraph and state how and in what manner the same was guaranteed by National to the named distributor.

[fol. 67] e. Identify each of the "small dairies" referred to in each instance in this paragraph, specifying those who allegedly sold milk in glass gallon containers.

f. Define the term "cost" wherever used in this paragraph, and specify each price below cost at which defendant National allegedly sold to its named distributor and each of the "extended periods of time" during which each such price allegedly was in effect.

g. State how and in what manner National and the named distributor allegedly persuaded, induced and coerced small dairies to fix and maintain a price differential, as claimed in subparagraph (c), specifying such price differential and identifying the acts and statements relied upon in support of said allegation by date and persons who participated in such acts or made such statements.

11. As to paragraph 19 of the indictment:

a. Specify each of the "extended periods of time" referred to in subparagraph (a).

b. Identify the "small dairies" claimed, in subparagraphs (b) and (c) to have suffered financial losses, and state the amounts of the losses claimed to have been suffered by each.

c. State how and in what manner, as claimed in subparagraph (b), "below-cost milk prices [were] financed by the resources of National," defining what is meant by the term "below-cost milk prices," and specifying the amounts and each occasion or period of time when it is claimed that defendant National's Kansas City plant drew upon funds or resources other than those which it had itself placed upon deposit.

[fol. 68] d. Identify each firm, person and corporation whose sales of milk in glass gallon containers are claimed

in subparagraph (d) to have been (1) restricted, or (2) eliminated.

e. State whether the alleged conspiracy had any effects other than those listed in said paragraph, and if so state each such other claimed effect, and identify the person or persons claimed to have been affected.

12. As to each of the following paragraphs of the indictment:

Par. 28, Count Three;
Par. 40, Count Five;
Par. 52, Count Seven;
Par. 64, Count Nine and
Par. 98, Count Fourteen

particulars as requested in paragraphs 9a and 9b of this motion with respect to paragraph 16 of Count One.

13. a. As to each of the following paragraphs of the indictment:

Par. 29, Count Three;
Par. 41, Count Five;
Par. 53, Count Seven;
Par. 65, Count Nine; and
Par. 99, Count Fourteen,

particulars as requested in paragraphs 10a, 10b, 10c, 10d, 10e and 10f of this motion with respect to paragraph 17 of Count One.

b. As to each of the following paragraphs of the indictment:

Par. 29(c), Count Three;
Par. 41(c), Count Five;
Par. 53(d), Count Seven;
Par. 65(d), Count Nine; and
Par. 99(c), Count Fourteen,

(1) Specify each of the prices below cost and the "special discount prices" at which National allegedly sold milk to its named distributor, and identify the "extended periods of time" during which each such price allegedly was in effect.

[fol. 69] (2) Specify each of the "prices designed to restrict or eliminate the sale of milk in glass gallon containers" at which the named distributor allegedly sold, identifying the periods during which each such price allegedly was in effect;

(3) Name each dairy and each other seller of milk in glass gallon containers whose sales allegedly were designed to be restricted or eliminated.

e. As to paragraph 53(c) of Count Seven and paragraph 65(c) of Count Nine, state how and in what manner the name distributor allegedly attempted to get small dairies to increase their milk prices, specifying each such small dairy and the prices of each with respect to which such attempt was allegedly made and identifying the acts and statements relied upon in support of said allegation by date and persons who participated in such acts or made such statements.

14. As to each of the following paragraphs of the indictment:

Par. 31, Count Three;
Par. 43, Count Five;
Par. 55, Count Seven;
Par. 67, Count Nine and
Par. 101, Count Fourteen,

particulars as requested in paragraphs 11a, 11b, 11c, 11d and 11e of this motion with respect to paragraph 19 of Count One.

[fol. 70] In The Alternative, Particulars Requested With Respect To Counts Two, Four, Six, Eight, Ten and Fifteen (Robinson-Patman Act Counts Involving Distributors).

15. As to paragraph 22 of the indictment:

a. State whether the phrase "in the course of said commerce" refers to the facts that:

(1) Defendant National purchased raw milk from Pure Milk Producers Association, receiving delivery thereof at its Kansas City, Missouri, plant from the co-operative's Butler, Missouri, receiving station;

(2) Said co-operative received the bulk of its milk from Missouri producers and a small portion thereof (approximately 10% or less) from Kansas producers, which portion was commingled with the Missouri produced milk prior to its sale by the co-operative to defendant National and other dairies;

(3) Defendant standardized, pasteurized, and otherwise processed and packaged said milk at its Kansas City, Missouri, plant; and

(4) Defendant National sold the processed, packaged product to its Paola-Osawatomie, Kansas, distributor at its platform in Kansas City, Missouri, and the same was picked up in his own truck by said distributor [fol. 71] at that platform about three times a week.

If not, state what "commerce" is referred to, specifying each fact relied upon in support of said allegation.

b. Specify each of the "unreasonably low prices" at which defendant National allegedly sold milk to its distributor, and give the dates when each such price allegedly was in effect.

c. Identify the persons, firms and corporations whose "competition" allegedly was intended to be destroyed.

d. State whether defendant National's alleged "purpose to destroy competition" was an expressed intent, and if so, state the date and place and the person or persons making such expressions on behalf of defendant National; to the extent that the alleged purpose is implied from acts or statements, specify the same, including the date and place and the person or persons who participated in each such act or in the making of each such statement.

16. As to paragraph 23 of the indictment.

a. Define and describe the "advantages" allegedly possessed by defendant National.

b. State how and in what manner defendant National allegedly "utilized" such advantages "to finance and subsidize a price war," identifying the acts and statements relied upon in support of said allegation by date, place and persons who participated in such acts or made such statement.

c. Identify each of the "small dairies" against whom it is claimed defendant National financed and subsidized a price war.

d. State how, and in what manner defendant National allegedly was in competition with "small dairies selling [fol. 72] milk in . . . the [specified] market," identifying the acts and statements relied upon in support of said allegation by date, place and persons who participated in such acts or made such statements.

e. Identify National's "cost," specifying the same for each unit of milk products claimed to have been sold below such cost.

17. As to paragraph 24 of the indictment:

a. Identify each of the "small dairies" which allegedly were caused (1) severe financial losses, and (2) to suffer losses in sales volume, and state the amounts of such losses claimed to have been suffered by each.

b. State whether the purported offense of defendant National had any "effects" other than those alleged in paragraph 24 of the indictment, and if so, state each other effect and identify the person or persons claimed to have been affected.

18. As to paragraph 25 of Count Two of the indictment, identify each of the many acts defendant National allegedly performed within the Western District of Missouri, Western Division, giving the dates and places thereof and the names of the persons who participated in such acts.

19. As to each of the following paragraphs of the indictment:

Par. 34, Count Four;
Par. 46, Count Six;
Par. 58, Count Eight;
Par. 70, Count Ten; and
Par. 104, Count Fifteen,

a. State whether the phrase "in the course of said commerce" refers to the facts that:

(1) Defendant National purchased raw milk from Pure Milk Producers Association, receiving delivery thereof

[fol. 73] at its Kansas City, Missouri, plant from the co-operative's Butler, Missouri, receiving station;

(2) Said co-operative received the bulk of its milk from Missouri producers and a small portion thereof (approximately 10% or less) from Kansas producers, which portion was commingled with the Missouri produced milk prior to its sale by the co-operative to defendant National and other dairies;

(3) Defendant National standardized, pasteurized, and otherwise processed and packaged said milk at its Kansas City, Missouri, plant; and

(4) Defendant National sold the processed, packaged product to its named Missouri distributor at its platform in Kansas City, Missouri, and thereafter, approximately three times a week, shipped the same to said distributor at his place of business within the State of Missouri by contract haulers who received payment from defendant National as required by the laws of the State of Missouri).

If not, state what "conformity" is referred to, specifying each fact relied upon in support of said allegation.

[fol. 74] 6. Give particulars as requested in paragraphs 15b, 15c, 15d and 15e of this motion with respect to paragraph 22 of Count Two.

20. As to each of the following paragraphs of the indictment:

Par. 35, Count Four;
Par. 47, Count Six;
Par. 59, Count Eight;
Par. 71, Count Ten; and
Par. 105, Count Fifteen,

particulars as requested in paragraphs 16a, 16b, 16c, 16d and 16e of this motion with respect to paragraph 23 of Count Two.

21. As to each of the following paragraphs of the indictment:

Par. 36, Count Four;
Par. 60, Count Eight; and
Par. 72, Count Ten.

particulars as requested in paragraphs 17a and 17b of this motion with respect to paragraph 24 of Count Two.

22. As to paragraph 45 of Count Six and paragraph 2 of Count Fifteen:

a. Identify the "competition" which allegedly has been eliminated.

b. Identify each of the "small dairies" which were allegedly driven from the specified market.

c. State whether the purported offense of defendant National had any "effects" other than those alleged in said paragraphs of the indictment, and if so, state each other effect and identify the person or persons claimed to have been affected.

23. As to each of the following paragraphs of the indictment:

[fol. 75] Par. 37, Count Four;
Par. 49, Count Six;
Par. 61, Count Eight;
Par. 73, Count Ten; and
Par. 107, Count Fifteen,

particulars as requested in pragraph 18 of this motion with respect to paragraph 25 of Count Two.

In the Alternative, Particulars Requested As to The Allegations Of Count Thirteen (Robinson-Patman) Not Count With Respect To The Greater Kansas City Market

24. As to paragraph 92 of Count Thirteen:

a. Specify each of the "unreasonably low prices" at which defendant National allegedly sold milk, and give the dates when each such price allegedly was in effect.

b. Identify the persons, firms and corporations whose "competition" allegedly was intended to be destroyed.

c. State whether defendant National's alleged "purpose to destroy competition" was an expressed intent, and if so, state the date and place and the person or persons making such expressions on behalf of defendant National; to the extent that the alleged purpose is implied from acts or statements, specify the same, including the date and place

and the person or persons who participated in each such act or in the making of each such statement.

25. As to paragraph 93 of Count Thirteen:

a. Define and describe the "advantages" allegedly possessed by defendant National.

b. State how and in what manner defendant National allegedly "utilized" such advantages "to finance and subsidize a price war," identifying the acts and statements relied upon in support of said allegation by date, place and persons who participated in such acts or made such statements.

[fol. 76] c. Identify each of the "small dairies" against whom it is claimed defendant National financed and subsidized a price war.

d. Identify National's "cost," specifying the same for each unit of milk products claimed to have been sold below such cost.

26. As to paragraph 94 of Count Thirteen:

a. Identify each of the "small dairies" which allegedly were forced to sustain (1) severe financial losses, or (2) losses in sales volume, or (3) both, and state the amounts of such financial and sales volume losses claimed to have been suffered by each.

b. Identify the "small dairies" which allegedly "were forced to request stores selling their products to refrain from advertising or selling said products at low prices," specifying for each small dairy so identified

(1) the stores requested so to refrain from advertising or selling at low prices;

(2) the prices (by product units) which each such store was requested to refrain from advertising or charging; and

(3) the person or persons employed by defendant National who allegedly were to be appeased thereby.

c. State whether the purported offense of defendants had any "effects" other than those alleged, and if so, state each other effect and identify the person or persons [fol. 77] claimed to have been affected.

In support of these motions defendant National Dairy Products Corporation offers its attached Suggestions of applicable authorities.

/s/ John T. Chadwell, /s/ Richard W. McLaren, /s/ Henry W. Buck, /s/ William H. Hoff-stot, Jr., Attorneys for Defendant, National Dairy Products Corporation.

January 22, 1960.

Of Counsel: Snyder, Chadwell, Keck, Kayser & Ragsdale, 135 So. La Salle St., Chicago 3, Illinois. Telephone: RAndolph 6-2545. Morrison, Hecker, Buck & Cozad, Seventeenth Floor Bryant Building, Kansas City 6, Missouri. Telephone: VIctor 2-5910.

Copy of the foregoing Motions of National Dairy Products Corporation to Dismiss Certain Counts of the Indictment, to Strike Certain Material from the Indictment, and for Particulars of Certain Allegations of the Indictment mailed to Earl A. Jinkinson, Attorney for the United States, 219 South Clark Street, Chicago 4, Illinois, this 22nd day of January, 1960.

Henry W. Buck, Attorney for Defendant, National Dairy Products Corporation.

[fol. 78] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION

[Title omitted]

MOTIONS OF DEFENDANT RAYMOND J. WISE TO DISMISS COUNT THIRTEEN OF THE INDICTMENT, TO STRIKE CERTAIN MATERIAL FROM THE INDICTMENT, AND FOR PARTICULARS OF CERTAIN ALLEGATIONS OF THE INDICTMENT—Filed January 22, 1960

I

Motions to Dismiss Count Thirteen of the Indictment

A. Defendant, Raymond J. Wise, moves the Court for an order dismissing Count Thirteen (p. 31) of the indictment upon the ground that the portion of Section 3 of the Robinson-Patman Act (15 U.S.C. § 13 a) under which defendant is charged is unconstitutional.

B. In the alternative, defendant, Raymond J. Wise, moves the Court for an order dismissing Count Thirteen (p. 31) as to him upon the ground that said count fails to charge an offense under Section 3 of the Robinson-Patman Act (15 U.S.C. § 13a).

[fol. 79] II

Motions to Strike Certain Allegations of the Indictment

A. Defendant, Raymond J. Wise, moves the Court for an order striking from the indictment as surplusage the following

> From Counts Eleven (p. 25) and Twelve (p. 28) the first five sentences (line 1 through the word "employees" in line 9) of paragraph 5, and all of paragraph 13,

as the same are incorporated by reference in Counts Eleven and Twelve by paragraphs 74 and 82 of the indictment, respectively.

B. If his motion I A based upon the unconstitutionality

of the portion of Section 3 of the Robinson-Patman Act here involved should be denied, and if his motion I B based upon the failure of Count Thirteen (p. 31) to charge him with an offense under Section 3 of the Robinson-Patman Act should be denied, then defendant, Raymond J. Wise, moves the Court in the alternative for an order striking from Count Thirteen as surplusage the following:

(1) the first five sentences (line 1 through the word "employees" in line 9) of paragraph 5, and

(2) all of paragraph 13,

as the same are incorporated by reference in Count Thirteen by paragraph 90 of said count; and

(3) the words "the advantages it possesses by reason of the fact that it operates in a great many different geographical localities in order to finance and subsidize" and the words "it and" as the same appear in the phrase "in competition with *it and* its distributor") from paragraphs 23, 35, 47, 59, 71, 93 and 105; and

(4) the words "and co-conspirators," appearing in paragraph 95 of Count Thirteen.

[fol. 80] III

Motion for Particulars of Certain Allegations of the Indictment

Defendant, Raymond J. Wise, moves the Court for an order directing the United States of America to serve on said defendant and to file with the Court a bill of particulars, to the extent that said particulars are now known to the United States, of certain allegations of the indictment.

Defendant requests particulars as to the following matters:

1. Defendant joins in the motion (paragraphs 1 through 8) of defendant, National Dairy Products Corporation, for particulars with respect to certain allegations of Counts Eleven (p. 25) and Twelve (p. 28) of the indictment and requests that, in addition to the particulars hereinafter sought, he be granted the same particulars of the allega-

tions of said counts of the indictment requested by defendant National Dairy Products Corporation.

2. If his motions I A and I B to dismiss Count Thirteen (p. 31) of the indictment shall be denied, then this defendant joins in the alternative motion (paragraphs 24 through 26) of defendant National Dairy Products Corporation for particulars with respect to certain allegations of said Count Thirteen and requests that, in addition to the particulars hereinafter sought, he be granted the same particulars of the allegations of said count requested by defendant National Dairy Products Corporation.

3. As to paragraph 2 of the indictment as the same is realleged in paragraph 74 of Count Eleven and paragraph [fol. 81] 82 of Count Twelve, as to paragraph 75 of Count Eleven, as to paragraph 83 of Count Twelve, and, in the alternative, if his motions I A and I B to dismiss Count Thirteen (p. 31) are denied, as to paragraph 2 of this indictment as the same is realleged in paragraph 90 of Count Thirteen, and as to paragraph 91 of Count Thirteen, state whether defendant, Raymond J. Wise, is alleged to have participated in the offense charged other than as a director, officer, or agent who has authorized, ordered or done any of the acts constituting in whole or in part the violation alleged to have been committed by the corporation of which he was a director, officer, or agent. If so, specify (1) each act claimed to have been done by defendant, Raymond J. Wise, in his alleged participation in the offense charged which was not done by said defendant as a director, officer, or agent authorizing, ordering, or doing any act constituting in whole or in part the violation alleged to have been committed by the corporation of which he was a director, officer, or agent; and (2) the date and place of each of such acts.

In support of these motions, defendant, Raymond J. Wise, offers his attached Suggestions of applicable authorities.

Respectfully submitted, /s/ John T. Chadwell, /s/ Richard W. McLaren, /s/ Henry W. Buck, /s/ William H. Hoffstot, Jr., Attorneys for Defendant, Raymond J. Wise.

January 22, 1960.

Of Counsel: Snyder, Chadwell, Keck, Kayser & Ruggles, 135 S. La Salle St., Chicago 3, Ill., Telephone: RAndolph 6-2545. Morrison, Hecker, Buck & Cozad, Seventeenth Fl. Bryant Bldg., Kansas City 6, Missouri, Telephone: VIctor 2-5910.

Copy of the foregoing Motions of Defendant Raymond J. Wise mailed to Earl A. Jinkinson, Attorney for the United States, 219 S. Clark St., Chicago 4, Illinois, this 22nd day of January, 1960.

Henry W. Buck, Attorney for Defendant Raymond J. Wise.

[fo. 82] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION

[Title omitted]

SUGGESTIONS IN SUPPORT OF DEFENDANT NATIONAL'S MOTION TO DISMISS COUNTS TWO, FOUR, SIX, EIGHT, TEN, THIRTEEN, AND FIFTEEN ON THE GROUND THAT THE "UNREASONABLY LOW PRICES" CLAUSE OF SECTION 3 OF THE ROBINSON-PATMAN ACT IS UNCONSTITUTIONAL. Filed January 22, 1960

Defendant National Dairy Products Corporation has moved to dismiss Counts Two (p. 9), Four (p. 13), Six (p. 16), Eight (p. 20), Ten (p. 24), Thirteen (p. 31), and Fifteen (p. 34) on the ground that the "unreasonably low prices" clause of Section 3 of the Robinson-Patman Act, under which those counts are brought, violates the Fifth and Sixth Amendments to the Constitution of the United States.

Invocation of the "unreasonably low prices" clause of Section 3 of the Robinson-Patman Act in the indictment herein presents an important constitutional question. Never before in the Act's 23-year history has the government, to our knowledge, brought criminal charges based

on the "unreasonably low prices" clause alone.[1] Indeed, the Supreme Court, pointing out the doubtful constitutionality of the clause, has recently found it "worthy of note that the Department of Justice has never, so far as we [fol. 83] have been able to determine, brought proceedings under this provision of '3'". *Nashville Milk Co. v. Carnation Company*, 355 U.S. 373, 378, n. 7 (1958). In the light of these remarks, and the determination in *Nashville* that civil actions cannot be brought under Section 3,[2] the Supreme Court may well have felt that it had for all practical purposes finally disposed of the obvious constitutional

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[1] *U. S. v. Bowman*, 89 F. Supp. 112 (D.C.N.D. Ill. 1949), involved allegations based on Section 3 as a whole. Judge Barnes declared himself "beset with doubts as to the constitutionality of [Section 3]" but deferred his decision on constitutionality until after trial. A verdict was directed for defendant and the constitutional question became moot.

[2] Reported civil cases involving the "unreasonably low prices" clause are: *Atlantic Brick Co. v. O'Neal*, 44 F. Supp. 39 (D.C.E.D. Texas, 1942); *Louisiana Farmers' Protective Union, Inc. v. A. & P. Tea Co.*, 131 F.2d 419, 422 (8th Cir. 1942); *A. J. Goodman & Son v. United Lacquer Mfg. Corp.*, 81 F. Supp. 890 (D.C. Mass. 1949); *Gordon, Wolf, Cowey Co. v. Independent Habeah & Candies*, 9 F.R.D. 700 (D.C.S.D.N.Y. 1949); *Spencer v. Sun Oil Co.*, CCH Trade Reg. Rep. (1950-1951 Trade Cases) ¶ 62,735 (D.C. Conn. 1950); *Hipps v. Bowman Dairy Co.*, CCH Trade Reg. Rep. (1950-1951 Trade Cases) ¶ 62,859 (D.C. N.D. Ill. 1951); *F. & A. Ice Cream Co. v. Arden Farms Co.*, 98 F. Supp. 180 (D.C.N.D. Calif. 1951), dismissed on the merits, *Baliah Ice Cream Co. v. Arden Farms Co.*, 104 F. Supp. 796 (D.C.S.D. Calif. 1952) aff'd 231 F.2d 356 (9th Cir. 1955), cert. den. 350 U.S. 991 (1956); *Hershel California Fruit Products Co. v. Hunt Foods*, 111 F. Supp. 732 (D.C.N.D. Calif. 1953); *Ben Hur Coal Company v. Wells*, 242 F.2d 481 (10th Cir. 1957), cert. den. 354 U.S. 910 (1957); *Dean Oil Co. v. American Oil Co.*, 147 F. Supp. 414 (D.C.N.J. 1956), aff'd 254 F.2d 816 (3rd Cir. 1958), cert. den. 358 U.S. 835 (1958); *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373 (1958); *Safeway Stores v. Vance*, 355 U.S. 389 (1958).

problems presented by the existence of what it termed "this vague provision". Indeed, it abandoned its usual reluctance to comment on matters not at issue and plainly suggested that this "vagueness . . . might give rise to constitutional difficulties, if such questions had to be faced." 355 U.S. at 378, n. 7.[3] The present indictment augurs a new government policy on the questionable clause, adopted despite the implicit warning of the Supreme Court. Consequently, the constitutional issue must now be resolved.

[fol. 84] I. The "Unreasonably Low Prices" Clause of Section 3 of the Robinson-Patman Act is Unconstitutionally Vague.

A. General Statement of the Constitutional Objection

It is a long-established principle of our constitutional law that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law". *Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926). As the Supreme Court has more recently explained (*U.S.* v. *Cardiff*, 344 U.S. 174, 176 (1952)):

> "The vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or what acts are prohibited. Words which are vague and fluid (cf. *United States* v. *Cohen Grocery Co.*, 255 U.S. 81) may be as much of a trap for the innocent as the ancient laws of Caligula."

Following these general principles the cases show that the "void for vagueness" doctrine has been applied to

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[3] Thus the court was concerned about and questioned the constitutionality of Section 3; it clearly reserved any decision on constitutionality for the case, if it ever arose, that raised the issue squarely. In view of this, Judge Yankwich's contrary interpretation of the *Nashville* opinion is puzzling and, we submit, wholly unwarranted. *F.T.C.* v. *Hunt Foods & Industries*, CCH Trade Reg. Rep. (1959 Trade Cases) ¶ 69,535 (D.C.N.D. Calif. 1959).

statutes of two general types: (1) vagueness as to the act proscribed and (2) vagueness as to persons covered. In the first instance it is impossible to tell what act is prohibited; such statutes are unconstitutional because they do not give adequate notice of the act made illegal. In the second the act prohibited is described with sufficient clarity but the description covers an area of activity broader than the legislature intended; under such statutes there is insufficient notice as to which persons acting in the manner proscribed will actually be viewed as violators.

Respondents submit that the "unreasonably low prices" clause of Section 3 of Robinson-Patman falls into the first category. Its full text is as follows:

> [fol. 85] "It shall be unlawful for any person engaged in commerce, in the course of such commerce, . . . to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor."

In order to determine whether a challenged price does in fact violate this act it is clear that some way of determining what is reasonable must be devised. But the language gives no hint of how to do so; nor does the general law or the custom of our society contain the standard Congress omitted.

It was long ago settled that a statute lacking such an ascertainable standard is unconstitutional. Summarizing earlier cases involving this problem in *Connally* v. *General Construction Co.*, 269 U.S. 385, 391-92 (1926), the Supreme Court has said:

> "The question whether given legislative enactments have been thus wanting in certainty has frequently been before this court. . . . [T]he decisions of the court upholding statutes as sufficiently certain, rested upon the conclusion that they employed words or phrases having a technical or other special meaning, well enough known to enable those within their reach to correctly apply them, *Hygrade Provision Co.* v. *Sherman*, 266 U.S. 497, 502; *Omaechevarria* v. *Idaho*, 246 U.S. 343, 348, or a well-settled common law meaning, notwithstanding an element of degree in the defi-

nition as to which estimates might differ. *Nash v. United States*, 229 U.S. 373, 376; *International Harvester Co. v. Kentucky*, *supra*, p. 223; or, as broadly stated by Mr. Chief Justice White in *United States v. Cohen Grocery Co.*, 255 U.S. 81, 92, 'that, for reasons found to result either from the text of the statutes involved or the subjects with which they dealt, a standard of some sort was afforded.' See also, *Waters-Pierce Oil Co. v. Texas* (No. 1), 212 U.S. 86, 108. Illustrative cases on the other hand are *International Harvester Co. v. Kentucky*, *supra*, *Collins v. Kentucky*, *supra*, and *United States v. Cohen Grocery Co.*, *supra*, and cases there cited. The *Cohen Grocery Case* involved the validity of § 4 of the Food Control Act of 1917, which imposed a penalty upon any person who should make 'any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries.' It was held that these words fixed no ascertainable standard of guilt, in that they forbade no specific or definite act."

Like the Lever Act prohibition on unreasonable rates and charges held to be unconstitutional in *U.S. v. L. Cohen Grocery Co.*, 255 U.S. 81 (1921), the Section 3 prohibition [fol. 86] on unreasonably low prices "forbids no specific or definite act". 255 U.S. at 89; see *Gorin v. U.S.*, 312 U.S. 19, 26 (1941). It is impossible to tell what category of prices fall within its ban. It is unconstitutional because, like the completely analogous Lever Act, it is equivalent to a statute that "penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury." 255 U.S. at 89.

The *Cohen* precedent is not isolated or outdated. In addition to the cases it cites, similar results were reached with respect to legally indistinguishable statutes in *International Harvester Co. v. Kentucky*, 234 U.S. 216, 221 (1914) ("market value under fair competition, and under normal market conditions"); *Collins v. Kentucky*, 234 U.S. 634 (1914) (same); *Cline v. Frink Dairy Co.*, 274 U.S. 445 (1927) ("reasonable profits"); *Connolly v. General Construction Company*, 269 U.S. 385, 391-393 (1926) ("ear-

rent rate of per diem wages in the locality").[4] Its relevance to the clause here at issue was recognized by the Supreme Court in *Nashville Milk Co. v. Carnation Company*, 355 U.S. 373, 378, n. 7 (1958), wherein *Cohen* was cited with approval as follows:

> [fol. 87] "The District Court indicated that the vagueness of the 'unreasonably low prices' provision might give rise to constitutional difficulties, if such questions had to be faced. Cf. *United States v. L. Cohen Grocery Co.*, 255 U.S. 81; *Cline v. Frink Dairy Co.*, 274 U.S. 445. See Comment, Mich. L. Rev. 845, 853-856. . . . . "

B. Reasonableness is not an Ascertainable Standard in Complex Economic Situations

In the case on which the government relies here, *E. & A. Ice Cream Co. v. Arden*, 98 F. Supp. 180 (D.C.S.D. Calif. 1951), Judge Yankwich was never able to explain why reasonableness should be viewed as a valid test or standard in the Robinson-Patman situation when it was specifically held not to be such in *Cohen*. Instead he took a position wholly at variance with *Cohen*; he suggested that a standard was innate in the reference to reasonableness be-

[4] *Weeds v. U.S.*, 255 U.S. 109 (1921) also involves the Lever Act; see also these decisions of other courts: *Parks v. Libbey-Owens-Ford Glass Co.*, 360 Ill. 130, 139-143 (1945) ("reasonable devices, means or methods for the prevention of . . . occupational diseases"); *U.S. v. Darst*, 59 F. Supp. 891, 893-894 (D.C.S.D. W. Va. 1945) ("reasonably fly and rodent proof"); *Ex Parte Taft*, 284 Mo. 531, 225 S.W. 457, 461-462 (1920) ("reasonable effort . . . to secure . . . employment"); Cf. *U.S. v. Pennsylvania R.R. Co.*, 242 U.S. 208, 237-238 (1916) ("reasonable request or notice"); other examples of the application of the *Cohen* principle are: *Winters v. U.S.*, 333 U.S. 507, 515 (1948); *Lanzetta v. New Jersey*, 306 U.S. 451 (1939); *U.S. v. Cardiff*, 344 U.S. 174 (1952); *Stromberg v. California*, 283 U.S. 359 (1931); *Musser v. Utah*, 333 U.S. 96, 97 (1948); *Champlin Refining Co. v. Corporation Commission of Oklahoma*, 286 U.S. 210 (1931); *Herndon v. Lowry*, 301 U.S. 242, 261-264 (1937).

cause of the common law's venerable dependence on the behavior of the reasonably prudent man.

But the common law standard was applied only in situations in which our social mores included a standard of reasonable behavior—primarily, the vast field of negligence. In our free competitive economy there is no established standard of reasonableness. Representative citizens do not agree as to what "reasonable" prices are or what price would be charged in a given situation by the reasonably prudent man. As pointed out by one commentator:[3]

> Certainly in the field of tort law society has provided standards, conduct below which is termed negligence. Here the doctrine is justified owing to man's cultural endowment of reason enabling him to anticipate the natural consequences of his acts. Thus a standard of reasonableness when applied to the speed of motor vehicles may be validly upheld. But an extension of the doctrine to the situation here considered seems undue. According to the dictates of society a man may sell his goods at any price he chooses, no matter how low, and still be free of culpability."

[fol. 88] Just what is an unreasonably low price? Judge Yankwich says it is related to cost, but he does not say how. Is a sale at cost unreasonably low? Must a profit be made; if so, a gross or a net profit and how much? A "reasonable" profit the Supreme Court has found to be unconstitutionally indefinite. *Cline v. Frink Dairy Co.*, 274 U.S. 445 (1927). Then, must it be the same profit earned the year or the month before, or the profit earned by competitors who charge reasonable prices, or the profit average in the industry? May the price be geared to an expected volume of business that may or may not be realized?

Is a price below cost necessarily unreasonably low? Suppose the seller is so inefficient that his costs are unreasonably high; or suppose the price meets a competitor's price

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[3] Silver, "Federal Remedies Available Against One Who Sells at an Unreasonably Low Price"? 9 Intra. L. Rev. (N.Y.U.) 239, 243-244 (1954); see also Comment, 55 Mich. L. Rev. 845 (1957).

(reasonable or unreasonable) or enables the seller to dispose of perishable goods about to spoil or provides an answer to some other temporary or emergency situation. Some such exceptions are set forth in the civil portion of the statute (section 2(a) of the Clayton Act as amended by the Robinson-Patman Act), but when criminal sanctions are applied no reference to them appears.[9] Surely businessmen do sell below cost and for a variety of legitimate business reasons.

And just how is cost to be determined? Judge Yankwich had the notion that, "Cost accountancy has reached the exactness of a science" and that, "an 'unreasonably low price' can be determined by ordinary business and accountancy methods . . . ". Neither the accounting profession nor the Supreme Court agrees. See, e.g., *Report to the Federal Trade Commission by the Advisory Committee on Cost Justification* (1956); *Automatic Canteen Company of America* v. *F.T.C.*, 346 U.S. 61, 68-69 (1953). Cost justification in civil Robinson-Patman cases resists [fol. 89] the development of ascertainable standards and is almost prohibitively difficult and expensive. The cases bristle with statistics interpretable only by cost accounting specialists and everyone involved is dependent on the opinion of experts. This is a far cry from the determination of the behavior of the reasonably prudent man in a negligence case. The burden of such proof can hardly be placed on defendants in a criminal action nor can resort to such esoteric standards possibly have been envisioned in the use of the word "unreasonably".

And these are only a few of the questions that must immediately be raised in the mind of anyone called upon to apply the "unreasonably low prices" clause.

The cases cited by Judge Yankwich do not support his position that "reasonableness" has been held a valid standard in complex economic situations. They fall for the most part into the negligence field or involve the very different problem of the propriety of delegations of power to administrative agencies to set reasonable rates, rules, etc.[9] Two cases there cited involved economic situations-

[9] E.g., *Tagg Bros.* v. *U.S.*, 280 U.S. 420 (1930); *Kay* v. *U.S.*, 303 U.S. 1 (1938); *U.S.* v. *Shreveport Grain &*

of a very simple and limited nature, quite different from the complex and speculative problems raised by the Robinson-Patman provision." *Nash v. U.S.*, 229 U.S. 373 (1913), in point. There the Sherman Act prohibition on [Sol. 90] unreasonable restraints in commerce was upheld not on the basis of the standard of the reasonably prudent man but by reference to ascertainable common law standards (229 U.S. at 378, emphasis added):[8]

> "Coming . . . to the objection that no overt act is laid, . . . the Sherman Act punishes the conspiracies at which it is aimed on the common law footing . . . it does not make the doing of any act other than *the act of conspiring* a condition of liability."

Judge Yankwich's summary of the facts that might be taken into account in deciding whether a price is "unreasonably low" illustrates the very different problem presented here. Despite an attempt to be specific, the list is so long (and still silent on circumstances considered determinative in other Section 2 cases)[9] that it amounts really

Elevator Cases, 287 U.S. 77 (1932); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940).

[7] *U.S. v. Ragen*, 314 U.S. 513 (1942) involving reasonable deductions for expenses in income tax returns (the court's emphasis on the "workability" of this provision as demonstrated by the compliance of thousands of corporations every year is in sharp contrast to the complete disregard of the "unreasonably low prices" clause of Section 3) and *U.S. v. Petrillo*, 332 U.S. 1 (1947) upholding anti-featherbedding provisions. Moreover, reasonableness was not the controlling standard in *Ragen*: the crime was not declaring unreasonable expenses but wilful evasion of taxes.

[8] The discussion on this point was dicta and did not identify the standard but only justified the fact that it was a standard less definite than, say, a mathematical equation. 229 U.S. at 377.

[9] See explanation of *Nash* in *Olney v. Frink Dairy Co.*, 274 U.S. 445, 460 (1927), and in *Connolly*, quoted at p. 4, *supra*.

[10] E.g., in *Spencer v. Sun Oil Co.*, CCH Trade Reg. Rep.

to saying that every circumstance involved in charging the disputed price is relevant and may be considered by court and jury in deciding whether the challenged price was "unreasonably low". These circumstances in themselves provide no standard. They must be judged in the light of subjective standards brought to bear by judge or jury. This is exactly what the Supreme Court condemned in *Cohen*. Congress may not outlaw whatever is "unreasonable in the estimation of the court and jury". 255 U.S. at 89. An overt act must be laid: an ascertainable standard must be provided. The clause at issue contains no defini- [fol. 914] tive description of the act intended to be proscribed; the defect is constitutional, and the "unreasonably low prices" clause cannot be enforced.

C. The Prohibited Motive Does Not Provide the Necessary Standard

If the prohibited act cannot be identified, it is clear that the added stipulation that the hidden act is prohibited only when done with a particular motive — "for the purpose of destroying competition or eliminating a competitor," . . . does not cure the constitutional defect. ". . . [W]illful conduct cannot make definite that which is undefined." *Screws v. U.S.*, 325 U.S. 91, 105 (1945).

Cases in which the requirement of scienter has saved an otherwise unconstitutionally vague statute fall in the category, quite distinct from *Cohen*, *Frid. Dairy*, and the "unreasonably low prices" clause of Robinson-Patman, of statutes in which the prohibited act is specifically but too broadly outlined (the second category described at p. 3, *supra*).[11]

(1950-1951 Trade Cases) ¶ 62,735 (1950) the court thought in terms of prices actually charged by competitors; and in *Hershel California Fruit Products Co. v. Hunt Foods*, 111 F. Supp. 732 (D.C.N.D. Calif. 1953), the problems of seasonal variation, spoilage, and over-supply came into play.

[11] *U.S. v. Ragen*, 314 U.S. 513 (1942) presented a problem that differed from these cases and from the situation here. In *Ragen* the crime was actually defined in terms of motive: the willful evasion of income taxes was the act proscribed. It happened that the type of evasion involved in

Illustrative of this category is the leading case, *Fairmont Creamery Company* v. *Minnesota*, 274 U.S. [illegible] *Fairmont* involved a Minnesota law outlawing [illegible] price differences irrespective of [illegible] the court that the legislature did not mean what it said. The overt act laid was ascertainable but far more comprehensive than the legislature could have intended. Accordingly, the statute was held unconstitutional [fol. 92] in the now classic statement: "We think the inhibition of the statute has no reasonable relation to the anticipated evil—high bidding by some with purpose to monopolize or destroy competition." 274 U.S. at 9.

In such cases specification of an illegal motive may give notice of which persons, among those who do the things described, will be held as violators. E.g. *Screws* v. *U.S.*, 325 U.S. 91, 102 (1945); *Miller* v. *Oregon*, 273 U.S. 675 (1927); *Boyce Motor Lines* v. *U.S.*, 342 U.S. 337 (1952); *Gorin* v. *U.S.*, 312 U.S. 319 (1941). The distinction between this type of case and the one at bar is set forth in *Screws*, holding Section 20 of the Criminal Code, which punishes those who wilfully deprive others of the rights guaranteed by the Fourteenth Amendment, constitutional. The Court thought those rights, though not set forth in the statute, were ascertainable when the statute was construed as limited to rights specified in decisions or other rules of law. Then, by construing the statutory word "wilful" to require bad faith, acting with the intention of doing what was prohibited by the statute, it found that vagueness as to the persons covered by the statute was avoided (325 U.S. at 102):

> "The requirement that the act must be wilful or purposeful may not render certain, for all purposes, a statutory definition of the crime which is in some respects uncertain. But it does relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware."

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the case was the deliberate padding of business expenses "reasonable" deductions for which were allowed. As a result the case is easily confused with the *Cohen* type of situation, when in fact it presents an entirely different problem.

But bad faith was not considered a substitute for defining the outlawed act (325 U.S. at 103, emphasis added):

> "We repeat that the presence of a bad purpose or evil intent alone may not be sufficient. We do say that a requirement of a specific intent to deprive a person of a federal right *made definite by decision or other rule of law* saves the Act from any charge of unconstitutionality on the grounds of vagueness.
>
> "Once the section is given that construction, we think that the claim that the section lacks an ascertainable standard of guilt must fail."

[fol. 93] We submit that Judge Yankwich misconstrued *Screws* when he made it the foundation for his decision in *F. & A. Ice Cream*. A major fallacy of his opinion is its failure to perceive that the statutes involved in *Fur mogt* and *Screws*, on the one hand, and *Cohen*, on the other, differ in kind.[12] The kind of statute involved here, like the one involved in *Cohen*, does not sufficiently specify the act proscribed and therefore, as *Screws* suggests, cannot be made definite by requiring a particular motive.[12] The motive must accompany a specific act, and if that act is unidentifiable, prospective violators are still without notice. And

[12] One sentence in *Screws* would seem to support the Yankwich interpretation of that case, but only when it is taken out of context. Explaining its interpretation of the word "wilful" in the statute involved in *Screws* as requiring evidence of a bad faith intent to violate the statute, the Court concluded, "By construing the statute [involved in *U.S. v. Ragen*, see n. 11, p. 40, *supra*] to require proof of bad faith we avoided the serious question which the rule of *United States v. Cohen Grocery Co.* . . . might have presented. We think a like course is appropriate here." When seen in the perspective of the entire discussion, it is clear that the rule of *Cohen* referred to is the general rule that statutes must provide sufficient notice and not the special aspect of that rule raised in *Cohen*, the problem of the statute that fails to specify the act intended to be proscribed. In the next paragraph the court clarifies its position as shown in the quotations in the text above.

this is true, as the Second's opinion recognizes, whether or not the stipulated motive is interpreted to [illegible] operate bad faith or not.

Judge Yankwich seems not as a practical matter to have accepted his own legal analysis. He talks of motive when trying to distinguish *Cohen*, but otherwise he recognizes that apart from motive, the statute must somehow provide a specific standard if it is to be considered either constitutional or workable. Hence the insistence on "reasonableness" as an appropriate and independent "standard". 98 F. Supp. at 184-185.

[fol. 94] Despite its vagueness, the "unreasonably low prices" clause does make clear that Congress intended before conviction could be had, separate proof that the price challenged was [illegible] unreasonably low [illegible] the purpose of eliminating competition. To say that specification of the illegal motive defines the act prescribed is to make the motive a definition of [illegible] whereas Congress clearly considered the two as separate tests. It would result in outlawing [illegible] purpose proscribed, thus writing [illegible] the act.

This is not just a theoretical difficulty. Under Judge Yankwich's analysis, it is clear that [illegible] consider as relevant [illegible] also be considered relevant in establishing [illegible] also *Best Bros. Milk Co. v. Borden Co.*, [illegible] Cir. 1957). The [illegible] "unreasonably low prices" clause, unlike the word "wilful" involved in *Screws*, does not suggest a bad faith purpose to violate the law, but only "the customary standard of guilt" [illegible] in *Ellis v. United States*, 206 U. S. 246, 257. "If a man intentionally adopts certain conduct in certain circumstances known to him, and that conduct is forbidden by the laws under those circumstances, he intentionally violates the law in the only sense in which the law [illegible] intent." *Screws v. U. S.*, 325 U. S. 91, 101, n. 10.

Using this standard of proof, under which the presence or absence of the illegal motive would be deduced from the objective fact surrounding the setting and effect of the challenged price, and considering, too, the usual presumption that one intends the foreseeable consequences of his

acts, the evidence of reasonableness and intent would be [fol. 93] equally broad and completely inseparable. Therefore, as a practical matter, the specification of an illegal motive adds nothing to the definition or prospective proof of the illegal act, which has been shown to be unconstitutionally vague.

Moreover, the illogic of viewing the specification of motive as a panacea for all vagueness, even of the kind that fails to formulate the act proscribed, happens to be particularly well illustrated by the "unreasonably low prices" clause. Competition is our accepted economic way of life. It is a fact of competitive economies that some competitors succeed at the expense of others. Every individual competitor acts with the intention of being among those who succeed and prosper. All economic acts are intended to get business and usually to get it from others. Price is the primary and most common competitive weapon. Rarely is a decision on price reached free of any contemplation of economic detriment to others.

Yet the motive proscribed in the "unreasonably low prices" clause differs from this normal, commended, economic motive, if at all, only in degree. If the motive suggested in the clause at issue is controlling, surely every businessman must be a violator of the act *per se*. Here the specified motive not only fails to narrow or clarify the area of proscription but, if anything, extends its onus to include the entire range of legitimate business activity. However obscure its real purpose, it is obvious that this is not what Congress intended.[13]

[fol. 96] Every possible interpretation of the "unreasonably low prices" clause allows courts and juries to determine by their own subjective standards what prices are and are not allowed. Such a statute is clearly unconstitutional.

[13] Accord, Silver, "Federal Remedies Available Against One Who Sells at an Unreasonably Low Price", 9 Intra. L. Rev. (N.Y.U.) 239, 242-243 (1954); Comment, 55 Mich. L. Rev. 845, 853-856 (1957); Note 100 U. of Penn. L. Rev. 1058 (1952); see also "The Meaning and Judicial Interpretation of Section 3 of the Robinson-Patman Act", 49 N.W. L. Rev. 273, 292-293 (1954), suggesting repeal.

II. The Constitutional Issue Should Not Await Trial But Should be Decided Now

The question whether a statute is so vague as to be constitutionally unenforceable is one on which record evidence could shed no light. All that is to be considered is the statutory language, which must be determined to be vague (or not) on its face. Therefore, the rule that grave constitutional issues should not be decided on motion to dismiss is not applicable here because that rule applies only where "there is a reasonable likelihood that the production of evidence will make the answer to the question clearer". *Borden's Farm Products Co.* v. *Baldwin*, 293 U.S. 194, 213 (1934). Here the constitutional issue must be resolved in some way before any decision on the facts can be reached; some standard by which to judge the evidence presented must be adopted. Section 3 cases that have postponed this constitutional issue have therefore erred.[14] Indeed, it is now settled law that a "statute challenged as repugnant to the due process clause of the Fifth Amendment must be tested 'on its face'; because it is 'the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression.' *Lanzetta* v. *New Jersey*, 306 U.S. 451 . . .". *U.S.* v. *D'Cadena*, 105 F. Supp. 202, 204 (D.C.N.D. Calif. 1952) and other cases there cited.

[fol. 97]

Conclusion

For the reasons stated defendant respectfully requests that its motion to dismiss the Robinson Patman counts of the indictment be granted.

Respectfully submitted, s/ John T. Chadwell, s/ Richard W. McLaren, s/ Henry W. Buck, William H. Hoffstot, Jr., Attorneys for Defendant, National Dairy Products Corporation.

January 22, 1960.

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[14] E.g., *U.S.* v. *Bowman*, 89 F. Supp. 112 (D.C.N.D. Ill. 1949); *Gordon Wolf, Concra Co.* v. *Independent Pickett & Candies*, 9 F.R.D. 700 (1949).

Of Counsel: Snyder, Chadwell, Keck, Kayser & Ruggles, 135 South LaSalle Street, Chicago 3, Illinois, Telephone: RAndolph 6-2545. Morrison, Hecker, Buck & Cozad, 17th Floor, Bryant Building, Kansas City 6, Missouri, Telephone, VIctor 2-5910.

Copy of the foregoing Suggestions in Support of Defendant National's Motion to Dismiss Counts Two, Four, Six, Eight, Ten, Thirteen, and Fifteen on the Ground that the "Unreasonably Low Prices" Clause of Section 3 of the Robinson-Patman Act is Unconstitutional mailed to Earl A. Jinkinson, Attorney for the United States, 219 S. Clark Street, Chicago 4, Illinois, this 22nd day of January, 1960.

Henry W. Buck, Attorney for Defendant, National Dairy Products Corporation.

[fols. 98-100] In the United States District Court
Western District of Missouri, Western Division

No. 20542-Criminal

United States of America, Plaintiff,

versus

National Dairy Products Corporation and Raymond J. Wise, Defendants

Transcript of Proceedings on Hearing Arguments on Sundry Motions—March 6, 1961

Appearances:

Hon. R. Jasper Smith, Judge, Presiding

For Government: Earl A. Jinkinson, Chief, James Edward Mann, Robert L. Eisen, Trial Attorneys, Department of Justice, Room 404, 219 South Clark St., Chicago 4, Illinois.

For Defendants: John T. Chadwell, Snyder, Chadwell, Keck, Kayser and Ruggles, 135 South LaSalle St., Chicago 3, Illinois. John H. Lashly, Lashly, Lashly & Miller, 705.

[fol. 101] Olive Street, St. Louis 1, Missouri. Martin J. Purcell, Richard W. McLaren, Morrison, Hecker, Buck & Cozad, 17th Floor, Bryant Building, Kansas City 6, Missouri.

Elsa A. Ripley, Official Reporter.

* * * * * * *

Be It Remembered that on this 6th day of March, A. D. 1961, arguments on sundry motions heretofore filed herein coming on for hearing before the Honorable R. Jasper Smith, Judge of the United States District Court for the Western District of Missouri, sitting in the Western Division thereof, and the parties appearing in person and or by counsel as hereinbefore set forth, the following proceedings were had:

The Court: I am not at all certain that there is any particular occasion to have a formal session on this, although I think probably we might dispose of a number of these matters on the basis of a bench ruling, and then, perhaps a little later on, retire to the library where we can be a little bit informal about it and work out the rest of it.

Let me ask you, Gentlemen, do either of you feel that you have overlooked anything in your briefs that would be of benefit to submit on oral argument? You have a request [fol. 102] for oral argument on these various motions.

Mr. Chadwell: Your Honor, as far as we are concerned, I believe we have given the argument, as Your Honor has observed, in quite some detail in the papers. Of course, an oral argument, if Your Honor wishes to hear oral argument,—

The Court: I have no objection to oral argument. I doubt the necessity for any extensive rehash of what you have incorporated in your various written briefs. I will say that all of them are excellent. I can't imagine that you have omitted very much, by inadvertence or otherwise, either one of you.

Mr. Chadwell: I think we have cited all the authorities on the subject that we are prepared to cite as far as our side is concerned, and an oral argument, of course certain aspects of it are discussed directly and less formally than in a brief. If Your Honor wishes to hear oral argu-

ment, we are prepared to present it on all the motions. On the other hand, of course we will be guided by Your Honor's desires in the matter.

The Court: How about you, Mr. Jinkinson?

Mr. Jinkinson: We, of course, are prepared to argue most [fol. 103] of it. There are some matters submitted in our brief that are not argued. Of course we are prepared to argue, but if the other side does not want it, we will not disagree.

STATEMENT BY THE COURT

The Court: Well, there are certain of the motions that I have the feeling that perhaps should be elaborated to some extent, largely because there is a —let me just simply put it this way, gentlemen:—I think that there is no question but that in a substantial number of places the Motion for a Bill of Particulars should be sustained. There are some that I feel that are improper and should not be sustained. Very frankly, my present feeling—and I am so signalling it ahead of time for the sake of any additional developments that you may give me—my present feeling is that these Robinson-Patman Act counts probably should be dismissed for the reason that I rather strongly feel that they are unconstitutional, plus the further fact that I think there is some serious doubt as to whether or not they state an offense in any case, although if the constitutional question was out of it, I think perhaps they could be buttressed by a bill of particulars and perhaps should stay in there.

I doubt very much that there is any offense stated as to defendant Wise in Count Thirteen. But basically and [fol. 104] fundamentally I have the feeling that the Robinson-Patman Act in its application here is probably so clearly unconstitutional that these Counts should be removed. Now, I would like to hear from both of you before I come to any definite conclusion on that.

Now, I can rule some of these others matters, I think, fairly quickly and in reverse order in the filings that have been done.

RULING BY COURT ON DEFENDANT WISE'S MOTION TO DISMISS COUNTS ELEVEN AND TWELVE

The motion of defendant Wise to dismiss Counts Eleven and Twelve will be overruled at this time. I have some serious doubts as to whether these two counts state a cause of action against Wise under the Sherman Act. I think the nature of the allegations that are contained in the indictment are strongly indicative that the remedy is, in fact, predicated on Section 14 of Clayton, but at this time, in the absence of particulars, I think there is some doubt in connection with it. So the motion to dismiss will be overruled.

RULING BY COURT ON SUPPLEMENTARY MOTION OF DEFENDANT WISE FOR PARTICULARS, COUNTS ELEVEN AND TWELVE

However, as a corollary to that, the supplementary motion of the defendant Wise for particulars on certain allegations on Counts Eleven and Twelve will be sustained substantially in their entirety. Now, I say "substantially [fol. 105] in their entirety" because I think when we get back to the relative informality of Chambers discussion, we ought to go over those in detail, because some of them are a little bit—I would say that the vice of the motion, the motion for particulars, as far as Wise is concerned, carries over from the motion in other respects where you get down too much into evidence detail, and I think it is important that that not be into evidence detail but simply a specification to show clearly that the action is directed to the Sherman Act activities as distinguished from the Clayton Act representative responsibility for the personal liability of the officers.

Mr. Chadwell: I understand Your Honor will permit us to discuss that particular point a little later on?

The Court: Yes.

Mr. Chadwell: There are two or three things that we would like to bring up.

OTHER RULINGS BY COURT

The Court: Now, you have motions to strike certain allegations as surplusage. That portion of the indictment that describes generally what a mammoth organization National Dairy Products Corporation is, that is paragraph

5 on page 3, lines 1 to 8 in toto, and the rest of that uncom-
[fol. 106] pleted sentence on line, will be stricken. I think beyond any question that is surplusage. It is inflammatory so far as a jury is concerned. It is unnecessary to make the proof that will be permitted as to the extensiveness of the organization so far as control of the market might be concerned.

The other request to strike will be denied.

The general motions to dismiss Counts One, Three, Five, Seven, Nine and Fourteen, the regular Sherman Act counts, will be denied. Any deficiencies that may exist in those counts so far as alleging that the activities are in commerce, I think properly can be corrected by the Bill of Particulars. Have I overlooked any of them?

Mr. Chadwell: I think you have covered them all, Your Honor. Did I misunderstand you? I thought Your Honor said you were planning to dismiss the Robinson-Patman counts on the grounds——

The Court: I said that I wanted to hear more about that——

Mr. Chadwell: Yes, sir.

The Court: —because I entertain some serious doubts, very serious doubts, as to the constitutionality of the Robinson-Patman Act and its amendment, and I want to hear
[fol. 107] you on those in elaboration of your briefs. I am mindful of the fact that the law on it is quite scanty, and we have done some independent research of our own on it and it is still scanty, but at the moment I feel that there is a sufficiently serious question about that that I would like to have some more discussion on it, and we can do that at this time if you care to.

Mr. Chadwell: Do you wish me to proceed with the discussion of that point?

The Court: Yes.

Mr. Purcell: Will you excuse me for a few moments, Your Honor?

The Court: Yes.

Mr. Purcell: If the Court please, I would only like at this time I intended to do it earlier—to introduce Mr. Robert F. Gordon, who is the President and General Manager, and introduce Mr. John Lashly, who is now counsel of record for the defendants in this case.

The Court: I am glad to meet them.

Mr. Purcell: Thank you.

The Court: I cannot say that I am well acquainted with Mr. Lashly, but he has had some distinguished predecessors. I know a good many of them.

Mr. Chadwell: If your Honor will give me just a mo-
[fol. 108] ment to re-arrange my papers in the light of Your Honor's ruling.

The Court: All right.

ARGUMENT ON BEHALF OF DEFENDANTS BY MR. CHADWELL

Mr. Chadwell: Your Honor. As Your Honor has indicated, the constitutionality of this Section 3 of the Robinson-Patman Act is a very serious question to say the least. I strongly feel that it is unconstitutional, and I think the Supreme Court has all but held that it is unconstitutional in Footnote 7, which we quote in our Brief, in the Nashville Carnation Milk case.

The fact that it is unconstitutional and the fact that the Government itself has entertained serious doubts as to its constitutionality can be strongly inferred from the fact that though the statute has been on the books since 1936, this is the first time, to my knowledge, that an indictment has been found under the third clause of the Section which concerns us here.

The Court: Let me ask you at that point

Mr. Chadwell: Yes?

The Court: I hope you don't mind my interrupting you.

Mr. Chadwell: No, sir; I would appreciate it.

The Court: What happened in connection with the Safeway case?

[fol. 109] Mr. Chadwell: In the first place, I want to say that Mr. McLaren and I were talking about that very point today. That case unfortunately was not recorded. I may be wrong about this, but it is my understanding that that case was under the second section of Section 3 which prohibits territorial price discrimination, which is not involved here, and furthermore the case was never tried. It was settled.

The Court: I had the impression that it was disposed of on nolle contendere. Is that it?

Mr. Chadwell: It was. That is correct.

The Court: Was it under Section 2 or Section 3?

Mr. Chadwell: It was under Section 3.

The Court: Under Part 2 or Pa.

Mr. Chadwell: I think it was Pa. 2, wasn't it?

Mr. Jinkinson: I think so.

Mr. Chadwell: Yes. But this particular point was not involved, and, as Your Honor observed on the remarks made by Mr. Justice Harlan in the Nashville Milk case, at that time at any rate, which was in 1958, no proceedings had been brought to the attention of the Supreme Court involving this particular clause of Section 3, the Court saying: "It is worthy of note that the Department of Justice has never, so far as we have been able to determine, [fol. 110] brought a proceeding under this provision of Section 3." And I think that is still so. At any rate if they have brought any I have never heard of it.

Now, I think the reason for that is clear enough. I don't propose to re-argue the matter that is in our brief on this point except in a general way. The cases have all been discussed at length by both sides, but I think it is important to observe that the only court which has held that this Section, that this provision of Section 3 is constitutional is the Southern District of California in the case——

The Court: That is Judge Yankwich?

Mr. Chadwell: Judge Yankwich's decision. And in that case, of course, he was considering a civil suit, not a criminal case, in which a suit had been filed for triple damages under this particular clause and he held that the suit would lie for triple damages, and also that the Act was constitutional considering it from the standpoint of civil litigation.

Well, the Supreme Court has since held, of course, that he was wrong, not in that case. But, essentially, the Supreme Court has since held in the Nashville Milk case, in the Carnation Milk case, that as a matter of fact this particular Section is not a part of the anti-trust laws and, [fol. 111] therefore, no triple damages can be brought under this Section. That was the direct holding of the Supreme Court, which was contrary to what Judge Yankwich held.

And with respect to the constitutionality of this Section, I respectfully submit to the Court that what Judge Yankwich had to say is directly contrary to the holding of the Supreme Court in the Cohen case and the Frink case where

the statutes were almost directly analagous. Now, the only thing that can be said, I would say, with respect to those two cases is that they are forty year old cases, decided back in 1920 or 1921. But Justice Harlan in his decision in the Nashville Milk case cited those two cases for his indication of the very strong doubt as to the constitutionality of Section 3, which shows that the statute of limitations hasn't run on the Cohen case; the Cohen case is still the law, and the Cohen case is still on the books, and the rationale of the Cohen case and the rationale of the writers who have analyzed this Section, to which we have referred and to which Justice Harlan referred, is sound, it seems to me, on basic principles of the constitutionality of criminal statutes. There is no question, the law is very clear, that for a statute to be constitutional, for a statute to form a basis of a criminal indictment, the crime must [fol. 112] be specified; it must be specified in such a way that the person indicted can determine what act he has done that is illegal.

Now, the language of Section 3 gives no hint whatsoever as to what is or what is not an unreasonably low price. As a matter of fact, there is no custom, there is no established common law rule, there is no commercial tradition that could form the basis for a determination as to what an unreasonably low price is. I think that that is where Judge Yankwich, in his opinion, fell into error. He drew an analogy between the prohibition against sales at unreasonably low prices in Section 3 and the well established reasonable man, reasonable and prudent act in the law of torts, and the Government has argued that and has also argued the broad language of Section 1, which prohibits restraint of trade without specifying what restraints.

But I think the answer to those arguments is found in the Connally case, which again has been the basis of those later comments by the writers, where the Court said this is a Supreme Court case in 1926 where the Court said that, "*A statute must have an ascertainable standard in order to be constitutional.*" And Your Honor will re- [fol. 113] call that in that decision the Supreme Court listed a number of instances where broad language in a criminal statute or a statute carrying criminal sanctions has been upheld because the language could be defined and

an ascertainable standard is present on the basis of the common law on the subject, or on the basis of custom and tradition in the field, and the Court referred to a general word used in a statute if it has a technical or other meaning well enough known to enable persons familiar with the field to correctly apply the statute. That is one instance where it is done and where it is upheld. The other is if it has a well settled common law meaning, as for example, the words in Section 1 of the Sherman Act. And in dealing with these instances where general language will be upheld in a statute which applies criminal sanctions, the Court in the Connally case distinguished the situation found in the Cohen Grocery case, which involved of course the Food Control Act of 1917, which imposed a penalty upon any person who should make, quote, "any unjust or unreasonable rate or charge in the handling of or dealing in the commodity mentioned." And it was held in the Cohen case, and re-affirmed in the Connally case, that those words fixed no ascertainable standard of guilt and the statute was unconstitutional.

[fol. 114] I don't see how you can have a much clearer situation or a much clearer analogy than the words of the Act in the Cohen case and the words under which this indictment was brought in Section 3 in the Robinson Patman Act, "unreasonably low prices." Now, all sorts of situations can determine whether a price is unreasonably low or not. What one man may think is an unreasonably low price, another man may think is not an unreasonably low price. There is no definite commercial rule or custom that would establish what is an unreasonably low price, as there is a well established law, a well established custom in the law of torts that establishes what a reasonably prudent man should do.

Now, I might say, Your Honor, that I have been engaged—Mr. McLaren and I—in a very extensive Robinson-Patman Act matter before the Federal Trade Commission, involving the cost of things. As Your Honor will recall, another Section of Robinson-Patman Act covers price discrimination, which permits a defendant to show a lower price given to certain customers because there are some savings in costs and savings to the customer favored with the lower price. Well, to prove what is low cost and what

is not low cost, what is a savings in cost and what is not a savings in cost is an exceedingly complex, uncertain and [fol. 115] ambiguous deal. Cost accountants are about as hard to pin down as lawyers when it comes to making any definite, ascertainable, established rule of accountancy is concerned with respect to cost allocations.

Well, one argument that the Government makes is, certainly it is an unreasonably low price where a defendant charged under Section 3 sells below cost. There are many circumstances when there could be sales below cost and the prices run unreasonably low, meeting competition, distressed merchandise, dozens of things that could happen where no one would say that a sale below cost is an unreasonably low price, and furthermore, *and furthermore*, the determination of what is or what is not a sale below cost is a highly controversial and exceedingly difficult problem.

Now, there is no mention in the Act here even about selling below cost. There are some state statutes that prohibit selling below cost, and that is one thing. This does not say, this does not prohibit selling below cost. It prohibits selling at an unreasonably low price. The Government has argued:—Well, that may be; this is very general; an unreasonably low price is not a, does not provide, perhaps, a reasonably ascertainable standard, but, *but* they argue—this statute provides not only that the sale [fol. 116] should not be at an unreasonably low price, but in order to constitute a crime this sale must be for the purpose of destroying competition or eliminating a competitor. So, they say, we must prove not only that the sale was at an unreasonably low price, but that it was for this prohibited purpose that is set forth in Section 3. That is an attempt to lift themselves by their own boot-straps. You cannot possibly find an ascertainable standard for the term "unreasonably low price" by the mere fact that in order to violate that provision there must be the prohibitive intent or purpose also found. There is no connection whatsoever between the two. The unreasonably low price prohibition must stand or fall by itself on the basis of whether or not it in itself establishes an ascertainable standard of guilt. And I submit on the basis of the authorities which we have cited, on the basis of the Cohen case, on the basis of the Connally case, the Frink case, and on the basis of

the National Milk comments by the Supreme Court when they were last given an opportunity to do anything, given an opportunity to pass on this question, to consider this question, that this statute is unconstitutional.

Now, here is an example of it right here, here in this case. What does the Government do? The Government [fol. 117] charges us in the words of the statute with being guilty of selling at unreasonably low prices. That is all there is. That is what they say. That is all they say. If they were able to be sure as to what this statute means, I think they would have done what they did in the Sherman Act case. They would have specified wherein were these prices unreasonably low, wherein were they. Why, it is unthinkable in an American court of law for a defendant to be indicted for selling at unreasonably low price under this statute, which is beset with all these problems that I have mentioned, and for the Government not even to say what the prices were, how they were unreasonably low, or anything about it. We are just indicted in the words of the statute and that is all.

Well, that gets into the question of the Bill of Particulars of course. But aside from that, I think the fact that they didn't do it is a confession of weakness right there. They can't do it. They can't do it because nobody knows what these words "unreasonably low price" mean and there is no basis on which a standard can be ascertained. This statute flies right in the face of well established Constitutional principles which have been affirmed and reaffirmed in the cases that I have mentioned.

[fol. 118] I have got great respect for Judge Yankwich. Judge Yankwich is well known, an able District Judge. But I think in this matter that the Judge was wrong, and I think that the Supreme Court has shown that he was wrong by the decisions which they have made and the comments which they have made, both before and after his decision.

I would make this one further comment, Your Honor, and that is that the statute is unfair; it violates every constitutional principle. We have here for the first time a criminal prosecution that the Government has brought under it, after the statute has been in effect for twenty-five years, and under the circumstances, it seems to me, and

we strongly urge that what Your Honor has indicated as your present feeling on this matter should be your final decision and that these Counts should be dismissed.

Your Honor, I take it that it is unnecessary to discuss in detail the Motion for a Bill of Particulars at this time as we can iron out the details of that a little bit later.

The Court: Yes, I think so.

Mr. Chadwell: So I shall not go into that. I might say to the Court that after Mr. Jinkinson has responded to [fol. 119] what I have had to say, I would appreciate an opportunity, at least with Your Honor's approval, of making a brief reply.

The Court: All right.

REPLY ARGUMENT ON BEHALF OF GOVERNMENT BY MR. JINKINSON

Mr. Jinkinson: I have asked Mr. Eisen to reply on behalf of the Government, but before he does so I don't know whether he will cover this point or not. I just want to make this point, that counsel exhibited a great deal of concern because the Government has not brought a case under the Section. I don't see how he can get any comfort in that in view of what the Supreme Court said in the [illegible] case. Counsel for the defendant was telling the Supreme Court that the Government hasn't brought this kind of a case for years. The Supreme Court answered, saying, "You get no rights because they have been lax in the use of the statute." So I don't see how he gets any comfort out of that.

He seems to be somewhat deeply concerned I might just as well bring it up now that with the Court's determination that there should be a Bill of Particulars granted in this case I don't want unduly to prolong the argument —but I think I do know what the courts have held with reference to granting Bills of Particulars. I know it is almost discretionary with the Court. It rests within the [fol. 120] sound discretion of the Court. If you say we should submit a Bill of Particulars that will be in the case. But I think it is fairly well to say that there are some rules and guide-posts announced by the various courts with reference to granting Bills of Particulars, and while I would be less than frank if I did not say that I have

observed in the last twenty-five years a departure from these principles, yet it seems to me that they stand for what they have always been enunciated to stand for, and that is the Bill of Particulars can only do one of three things:—

(1) It can inform the defendant of the nature of the charge against him, if he is not informed in the indictment;

(2) It can prevent him from being indicted a second time; it is a guard against double-jeopardy.

But the Bill of Particulars should not be granted just because counsel wants it.

In this respect, at the risk of incurring the displeasure of the Court, I would like to have a short time to discuss the Bill of Particulars in this particular matter—I am going to have Mr. Mauf do it—because it is not set out in detail in our Brief as to why we think they should not be granted a Bill of Particulars in this case, and if the [fol. 121] Court will permit us to have two or three minutes or so in discussing as to why we think a Bill of Particulars should not be granted in this case, we would appreciate it.

The Court: I will be glad to let him do that.

Let me point out there is another reason for a Bill of Particulars, which you did not mention, and that is that a Bill of Particulars in a case, whether it is in the category of a big case or not, within the definition of the Prettyman Report, is also granted many times as an aid to the Court in expediting the trial of the case. It goes beyond the two rules, the two reasons that you have given, plus this further fact, Mr. Jinkinson,—we might as well lay this thing on the table right now—that if you had conformed to the letter and the spirit of the original order that Judge Ridge made in this case within the thirty day period after the indictment was returned, a great portion of the material that will be required in this Bill of Particulars would not have been necessary.

Mr. Jinkinson: Let me say in that respect that, unless I am mistaken and I might be, I think the Prettyman Report goes to the trial.

The Court: I am perfectly well aware of that.

Mr. Jinkinson: Civil rules are much different from criminal rules.

[fol. 122] The Court: I am perfectly aware of that. We used the term "Prettyman Reports" as a matter of convenience in expression. I am talking more about the later reports, whatever terminology, and the encouragement of its use in criminal cases as largely as it can be, bearing in mind the technical differences that must be met.

Mr. Jinkinson: The courts so operating have put a terrible burden on the Government by placing the Government in such a strait jacket.

The Court: There is no desire to place the Government in a strait jacket. I doubt that many Government attorneys who have appeared here have felt that there is any particular basis for an accusation that the Government has been placed in a strait jacket in criminal [illegible] certainly there is no intention of doing that. However, I do think that we must get back to basic principles in some respects, and one of them is that, even in the anti-trust cases, even where the defendant is as big as we can conceive National Dairy Products Corporation is, notwithstanding the delegation of the first nine lines of Paragraph 5, that concern is still presumed to be innocent until it is proved guilty.

[fol. 123] Mr. Jinkinson: That is true, but it is only entitled—

The Court: And I think they are entitled to information in certain particulars, even though it might be known to them, the particular details asked for, but they are entitled to information as to the nature and basis of the Government's claim.

Mr. Jinkinson: Well, I thought that was pretty well spelled forth for them in the Indictment.

The Court: I don't think it is spelled out at all. Now, I am not going to misunderstand me, my present intention is not to just shotgun sustain the Motion for a Bill of Particulars. I have no fixed intention of doing that because they ask a very, very great deal more details than I think they are entitled to under a Bill of Particulars, but some points I think they are entitled to.

Now, I have no desire to cut you off on a discussion on the Bill of Particulars, and I expect to spend a great

deal of time on it, but I do very definitely have the feeling that if the thrust of your argument is directed to an outright overruling of the Motion for a Bill of Particulars in all respects, that there will be a certain amount of wheel spinning because I don't think it can be. Now, as [fol. 124] to the details, as to how much is to be developed by the Bill of Particulars, that I want to go into in considerable detail, and with considerable care.

Mr. Eisen: We would still like to argue it.

The Court: Surely. You may have that opportunity.

Mr. Robert L. Eisen: Good morning, Your Honor.

The Court: Good morning.

REPLY ARGUMENT ON BEHALF OF GOVERNMENT BY MR. EISEN

Mr. Eisen: May it please the Court, first I would like to answer a few of the contentions made by Mr. Chadwell this morning, one of which was with respect to the infrequency, claimed infrequency, with which the Government has seen fit to use Clause 3 of the Robinson-Patman Act.

In the first place, I think it was pointed out in our Brief that in almost all instances of behavior of this type there is a Section 1 or Section 2 offense involved, and I think it was also pointed out in our Brief that in numerous cases, where selling at unreasonable prices was used as discriminatory or as a means for monopolization. So that that would, in some respects, be responsible for the fact that this Section was little used. Of course I really don't know that it has been little used. I have no infor- [fol. 125] mation, and Mr. Jinkinson, who has been with the Anti Trust Division as long as anybody else that I know of, he hasn't informed me of any reluctance to use this clause where it was for the best one of the uses of the clause. I know our office had a case a year and a half ago in Michigan, in the District Court, which resulted in a plea of nolo contendere, I believe, under Clause 3, a very similar case to this case.

The Court: May I make the observation, that perhaps the weakest argument that has been made by the defendant as to the unconstitutionality of this particular question is the fact that the Government may have been reluctant to use it. That doesn't mean a thing to me.

Mr. Eisen: Well, but that also—but in answering that

if also leads into another point, though, which should tend to sustain the Act entirely, and that is that this behavior has been examined repeatedly, for many years, under the Sherman Act, and even perhaps at common law. I noticed that counsel referred to common law standards and I don't know but it seemed to me the basic distinction between anti trust wise common law and anti trust wise, as we call it, in the Sherman Act there are two basic distinctions. One was at common law, I believe that you [fol. 126] had to show that the restraint was unreasonable and also at common law you had to show guilty intent. Both of these things were eliminated in the Sherman Act. However, both of these things are present in the Robinson Patman Act. So if you are going to draw on common law anti trust law, it seems to me that tends to support the National Dairy case from the constitutionality of the Robinson Patman Act.

But I would like to go onto the fact Mr. Cradwell also referred to the unreasonably low prices being difficult to determine. Now, in this case I don't think the Court will find that the unreasonably low prices would be hard to determine, and the cases which have tried the point, in other words where the constitutional point was raised but the courts did not treat the case, the official California Fruit Products Company, the Hunt Foods, a Northern District of California case in 1934, United States v. Bowman Dairy Company, which was another Government case, which Mr. Cradwell overlooked, in the Northern District of Illinois in 1940, and the

The Court: What was that one?

Mr. Eisen: United States v. Bowman Dairy.

The Court: I don't believe that was overlooked. I think I have it.

[fol. 127] Mr. Eisen: But in those cases and in the F. and A. case also, the Court did not have any difficulty, instead of in the cases where the question was deferred, they did not have any difficulty in arriving at their decision. Except in the F. and A. case the Court, even though it ruled adversely to the plaintiff, and said that the statute was not violated, as far as we know from reading the opinions, in those cases there was no difficulty in trying those fact under the statute.

Now, the defendants try to treat this statute piecemeal. They take Section 3, which reads very simply, it is unlawful for corporations doing business in interstate commerce to, quote, "sell at unreasonably low prices for the purpose of destroying competition or eliminating a competitor." They want to treat that piecemeal and take it apart. Of course it is easy to take a statutory provision and take it apart and there are very few statutes that would stand the test of constitutionality if that were permitted to be done. But when the statute is read as a whole, it becomes apparent that the language used is merely a codification of numerous court decisions under anti-trust laws prior to establishment, and the particular practices engaged [fol. 128] in by many violators down through the years. So frequent has been the use of the Robinson-Patman Act language and language similar to it, that it is really not necessary to look behind the anti-trust cases in order to test the constitutionality of Section 3. As a matter of fact, the language used in Clause 3 found its way into the statute as a result of continued observation of this kind of behavior on the part of would be violators of the anti-trust law.

Now, that statute was enacted in 1936 as an amendment to the Clayton Act, and was known as the Borah-Vanice Amendment. That Amendment followed the conclusion of an investigation by the Federal Trade Commission into the Chain Store system, and what they found out, as a result of their investigation, was that Chain Stores received favored and discriminatory price cuts from suppliers which advantages were not justified on the basis of lower cost to Suppliers; and (2) the Chain was in a position to sell at reasonably low prices in areas where it had substantial competition while at the same time supporting those losses from areas where they didn't have any competition.

Now, the new criminal amendment, represented by the Borah-Vanice Bill, also followed closely the language of [fol. 129] the cases under similar civil prohibitions which were set forth in Section 2 (a) of the Clayton Act, which was passed back in 1913.

Now, one case tried under that Section 2(a) is so similar to our present case that I would like to go into it for

a minute because it wasn't discussed very thoroughly. I don't know if it was even cited—it may have been an oversight—in our brief—and that is the Puerto Rican American Tobacco Company, Puerto Rico vs. American Tobacco Company, 38 Fed. (2d) 234. That is from the Second Circuit, 1929. The case has been cited and reciled and is still good today. But in that case the American Tobacco Company—the similarity of that case and this case, Your Honor, will note here, will be very great—in that case the American Tobacco Company, makers of Lucky Strike cigarettes, sold Lucky Strikes in Puerto Rico at prices substantially lower than in other markets, thus injuring the plaintiff, who manufactured a low grade of cigarette made of less expensive ingredients than Lucky Strike. The conduct of American Tobacco in that case is closely analogous to that contained in the charge of the indictment against National Dairies. First of all, although American Tobacco Company was the largest company in the markets, it also competed with Reynolds Companies Camels, and later [fol. 130] Myer's Chesterfields and others. Just as National has done with its distributors here, when the American wanted to start a price war in Puerto Rico, it called its sole customer in Puerto Rico, its distributor, to New York and guaranteed that customer against loss as high as twenty thousand dollars a year as long as the customer agreed to sell at a lower price in competition with the plaintiff.

Here is what the Court said—I am quoting from page 237:

> "Lucky Strike was a much more expensive cigarette than Appellee's brand, and if it sold at a lower price, it would be practically impossible for its Puerto Rican competitor to continue. Its cost was more than double that of Appellee's, considering the elements of manufacturing cost and the quality of the tobacco used. This conduct, together with the guarantee against loss to its sole customer there, is sufficient evidence of a design and plan to put the Appellee out of business, either because of some real or fancied wrong due to unfavorable legislation, or else because it was used as an excuse to proceed against, to eliminate the weaker competitor. In either case it was violative

[fol. 131] of the statute. Letters written by this agent of the Appellant to its officers explaining the designs and purposes, justified Appellee in its claim. The Appellant could stand this competition in a price warfare. Its sole business in Puerto Rico was the sale of Lucky Strike, which was about one-half of one per cent of Lucky Strike business throughout the world. A loss there would not impair its financial stability. But the Appellee could not hope to compete.

"Such price cutting to capture the market, eliminating Appellee therefrom, is prohibited by the provision of the Clayton Act. It was foreign to any legitimate commercial competition. The Gillip and Woodward books showed the monthly loss after June 28th, on a sales volume of 3,000,000 cigarettes per week of $18,200 for August and September alone, and the loss continues. This added to Appellant's loss shows a willingness to accept an annual loss of $175,000.00."

It will be shown that the losses sustained by National here were similar.

Now, the Puerto Rico American case in addition to numerous other anti-trust cases, some of which have been already discussed in the Government's brief, this case is [fol. 132] also discussed in Judge Yankwich's decision. So far as I know, Judge Yankwich has probably tried more anti-trust cases than any other District Judge—I could be corrected—and certainly anyone reading this decision—I have re-read it a couple of times myself and the more frequently I re-read it, the more convinced I am that it is a road-block in the way of this defendant's motion that they just can't get around. It is a well reasoned discussion of each and every case cited, also the National case, which I will get to myself, and I think if the Court is inclined, perhaps, to doubt the constitutionality of this Section, if the Court itself would re-read this case, I think that those doubts would be resolved because the more I looked at it—

The Court: May I interpose the comment that I have.

Mr. Eisen: Thank you. Now, if you recall, in the case the Court makes a very thorough examination of the relationship of the commerce clause in the Constitutional

scheme of things and how in delegating to Congress its broad powers to regulate interstate to impose the Constitution in itself does not limit the legislative powers with respect to matters of commerce as might be applied to matters of free speech and so on referred to in that clause. [fol. 133] And an old case under the Sherman Act discussed that point, the Addyston Pipe and Steel Company case, cited in the Government's brief. It was in that case that the Supreme Court stated that the liberty of the individual to enter into a private contract does not prevent or limit Congress in any way from voiding or prohibiting any such contract where the statute may be to regulate interstate commerce to any substantial extent. And Judge Yankwich said, that in view of the Supreme Court decision in the Addyston case, the power to exclude from interstate commerce becomes practically unlimited, as stated in the Constitution, and legislative prohibition, which would violate due process if it were not related to commerce, would fulfill the constitutional standard when they are related to commerce.

Now, I think that the Judge's dissertation on the standard of reasonableness as applied to conduct in a numerous line of anti-trust cases, the reasonable man cases, is also authority for the fact that in discussing the reasonable, the fact that a price is unreasonably low because in many instances the unreasonable conduct question is much more vague that it would be in the question of unreasonably low prices. For example, the care and skill applied to conduct [fol. 134] like due care negligence cases and many of those cases which Judge Yankwich cited, such as the cases when reasonability of speed of motor vehicles, the reasonable rates for fees to be charged for services, reasonable deductions to be made from income taxes, the almost economic controls of state statutes which prohibit contracts which reasonably calculate or which tend to fix prices, was upheld. That was in United States v. Shreveport Grain & Elevator Company, in 1932, 287 U. S. 77.

Now, a provision in the Food and Drug Act, which permitted "reasonable variations in weights and measures to be established by Departmental rules", was sustained against attack of indefiniteness in—well, that was in the Shreveport case, and another case that reached the same

conclusion was a case under an Idaho statute relating to "any cattle range", or, if related to or it prohibited "grazing cattle on any cattle range previously or usually occupied by any cattle growers." It seems that this language, and in some other cases the language was far more vague than what we are dealing with in the Robinson-Patman.

Now, any test of conduct contains a variable element which may call for different conclusions by different persons and a different,—even under the same circumstances, [fol. 135] but that in itself has never been considered a fatal vice. Judge Yankwich's opinion discussed a case involving a hotel keeper: That statute required the hotel-keeper in case of fire to give notice to all the guests at once and supposed, quote, "to do all in their power to save such guests and inmates." This was sustained in Miller v. Straw, 1915, 239 U.S. 426. The Court said:

> "Rules of conduct must necessarily be expressed in general terms and depend for their application upon circumstances, and circumstances vary. It may be true, as counsel said, that men are differently constituted, some being abject cowards and few only are real heroes, but the brains of some people work rapidly and normally in the face of danger, while other people lose all control over their actions. It is manifest that rules cannot be prescribed to meet these varying qualities, yet all must be brought to judgment, and what better test could be devised than the doing all in one's power as determined by the circumstances."

The Court says, "... yet all must be brought to judgment." In that case you had to have some statute by which this behavior could be brought to judgment. There must be [fol. 136] some duty on the part of an inn-keeper to give warning to his guests. The fact that it might be hard to determine whether he did his duty or not is not sufficient reason for not having such a law, and, if possible, the Court should give effect to the law rather than to negate the law by finding it unconstitutional.

Now, the constitutionality of the—the Sherman Act itself was attacked as being vague in the Nash case. That was Nash v. United States, 1913, 229 U. S. 373.

Now, in the Nash case the Sherman Act was attacked on the grounds of vagueness and it was argued that the statute in its definition contained an element of degree as to which estimates could differ and that criminality cannot be made to depend upon whether a jury may think an act is reasonable or unreasonable. The Court answered through Mr. Justice Oliver Wendell Holmes, which has now become a well known one, where he says:

"But apart from common law as to restraint of trade thus taken up by the statute, the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimate it, some manner of degree. If his judgment i wrong. [fol. 137] not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death. An act as causing death may be murder, manslaughter, or misadventure according to the degree of danger attending it by common experience in the circumstances known to the actor. The very meaning of the fiction of implied malice in such cases as at common law was that a man might have to answer with his life for consequences which he neither intended nor foresaw."

And that case is further analyzed by Judge Yankwich.

But the Sherman Act has been called vague and it has been frequently cited as being a virtue, its vagueness is a virtue, it has been referred to as a virtue, a charter of economic freedom. The fact it is vague allows a latitude that you might not ordinarily get in economic situations where you need some flexibility, but it is, nevertheless, constitutional the same as the Robinson-Patman Act.

The four principal cases relied upon by the defendants, which Mr. Chadwell discussed this morning, two of which he discussed, was the United States v. The L. Cohen Grocery Company, and Cline v. Frink Dairy Company, and Fairmont Creamery Company v. Minnesota, and Sorenson v. United States.

[fol. 138] Now, these cases, the L. Cohen Grocery case was the foundation for a later case, the Frink case, to test the reasonableness or unreasonableness of the matters of the character here involved, which were also involved there, and that was their contention; but I don't believe

Your Honor, if we will examine the statutes in those cases that the same issue was involved in those cases. The Supreme Court itself could see no conflict between those cases, and they have referred to them repeatedly as presenting different solutions of different problems of statutory construction.

For example, in the Fairmont case, if you recall, the statute, prior to the amendment, which was in question at the time was a statute which prohibited discrimination in prices between localities, both with the intention of creating a monopoly or restraint of trade and to prevent competition or to destroy the business of a competitor, but the Act under consideration had eliminated this element of attempt and they have eliminated purpose as an element of the offense, and the Court says, to quote the language from the Fairmont case:

> "It was this element which led the Court to the [fol. 139] conclusion that the standard of certainty was not present."

So that where you have intent taken with a specific act, you have sufficient definiteness and certainty to prescribe a valid constitutional scheme.

Now, the Colorado statute, which was considered in the Cline case, was very similar. That was declared invalid because unreasonableness of price was not tied to a purpose. The Court distinguished the situation from that which obtained in the Nash case. They said:

> "This review showing what was the standard of criminality in anti-trust law indicates clearly that the decision in the Cohen case was not inconsistent with the Nash case because the latter case did not relate to the reasonableness or excessiveness of prices charged when necessary, without warning, as a basis for criminality, which the former finally did."

That is Cline v. Frink Dairy at p. 887.

But as we have our situation here, where the statute provides an element of wilful design and purpose to achieve certain results through the fixing of prices or rates, the quantum of certainty is established.

[fol. 140] . Now, the chief vice in the Cohen case, that is, the chief vice in the statute, lay in the fact that forbade no specific act whether done wilfully or not. The statute provided:

> "It is hereby made unlawful for any purpose wilfully to make any unjust or unreasonable rate or charge in handling of, dealing in or with any necessaries."

Let's just superimpose that statute on the Robinson-Patman Act. In the first place, Mr. Chadwell said that this statute is analogous with the Robinson-Patman Act. I submit it is in no way analogous to the Act. First of all if we superimpose the statute on our situation, it would read something it was made unlawful to make any unjust or unreasonable charge in the handling or dealing with any milk. That would make it even more definite than it was in that case, but it wouldn't go on further. In our case it does not merely say an unreasonable rate; it says unreasonbly low. It seems to me, first of all, that the term "unreasonably low" itself carries with it an unusual connotation, something definite, and in the second place our statute does not end with the mere statement of unreasonability. It is with the purpose of eliminating competition or eliminating a competitor. So that this, the Cohen case, neither [fol. 141] spelled out any specific act nor was it tied to a purpose.

Now, I think I can demonstrate here that even if it is tied to a purpose, even if no specific act, the courts will sustain the statute.

Now, there is a case we will get to those cases in just a minute but in subsequent cases the Supreme Court stated that such prohibitions are adequate compliance within the requirement of definiteness in the criminal statute only if they are unrelated to an attempted purpose other than the doing of the act itself, but where the specific act announced is tied to a specific intent to achieve certain results there is certainty of purpose.

One of these cases that I was going to mention is the Goren case, Goren v. United States (1941) 312 U. S. 19. In that case the Supreme Court was treating the Espionage Act which prohibited obtaining and delivering information. That was tied with the purpose, "with the intent and reason

to believe that the information was to be used to the injury of the United States." There the Court had no difficulty in distinguishing its prior cases and holding that the norm of definiteness had been satisfied.

The Court said:

> "We find no uncertainty in the statute which de- [fol. 142] prives a person of the ability to pre-determine whether the contemplated action is criminal under the provisions of this law. It is obvious the illuminating words in the statute are those requiring both intent or reason to believe the information to be obtained is to be used to the injury of the United States but to the advantage of any foreign nation."

This requires those prosecuted to have acted in bad faith. The sanctions apply only if that is established.

In another case the Court, in interpreting the civil rights statute applies the same ones. Justice Douglas, in Screws v. U. S. (1945) 325 U.S. 91, the following passage is found:

> "The Court indeed has recognized that the requirement of a specific intent to do a prohibited act may avoid those consequences to the accused which may otherwise render a vague and indefinite statute invalid. The constitutional vice in such a statute is the intention to the accused of injustice, placing him on trial for an offence the nature of which the statute does not define, and hence of which it gives no warning." Citing L. Cohen. "But where the punishment imposed is only for an act knowingly done, for the [fol. 143] purpose of doing that which the statute prohibits, the accused cannot be said to suffer from lack of warning and knowledge that the act which he does is a violation of law. The requirement that the act must be wilfull and purposefully may not render certain for all purposes the statutory definition of the crime which is, in some respects uncertain, but it does relieve the statute of the objection that it punishes, without warning an offense of which the accused was unaware."

This doctrine was re-affirmed in U. S. v. Petrillo, which also dealt with a very vague provision which wasn't tied

to the intent. There the Court was considering a provision of a communication statute which made it a crime to use force or violence or intimidation to compel a radio broadcast licensee to employ or agree to employ in connection with the conduct of his business any person or persons—listen to this—"any person or persons in excess of the number of employees needed by such licensee to perform actual service." To the contention that there was no test by which to determine whether employees were needed, the Court gave this answer and here the Court is considering the question of whether the broadcaster can say, "This is all the employees I need"

[fol. 144] The Court says:

> "We think that the language Congress used provides adequate warning as to what follows under its terms and marks boundaries sufficiently distinct for judges and juries fairly to administer the law in accordance with the will of Congress. That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense. (Citing cases.) It would strain the requirement for certainty in criminal law standards too near the breaking point to say that it was impossible judicially to determine whether a person knew when he was wilfully attempting to compel another to hire unneeded employees. (Citing more cases.) The Constitution has erected procedural safeguards to protect against conviction for crime except for violation of laws which have clearly defined conduct thereafter to be punished, but the Constitution does not require impossible standards. The language here challenged conveys sufficiently definite warning as to the proscribed conduct when measured by com-
> [fol. 145] mon understanding and practices. The Constitution requires no more." 332 U.S. 1 at p. 7.

Now, thus it is apparent that the Fairmont case and the Cline case are not applicable here because the statutes struck down in those cases were restrictions that were unrelated to a purpose or motive, which is a necessary ingredient in violations under the Robinson-Patman Act. Al-

though a wilfull intent was necessary for the violation of the statute in question in the Cohen case, there was no specific act made unlawful in that statute. The Screws case stands for the authority for the proposition that where the statute requires wilfull and purposeful behavior it is safe from the objection that it punishes without the accused being aware that he is engaged in illegal conduct. The Cohen and Petrillo cases eloquently echo this principle.

Now, what about unreasonably low itself as a valid standard? Interpreting the Robinson-Patman Act we again have to bear in mind that in judging this language that it is enacted under the Commerce clause, which in Constitutional and subsequent cases, in cases under it, have provided that very broad powers were given to Congress in regulating interstate commerce.

> [Vol. 146] "The specific object of the anti-trust laws is to make ours a competitive economy, and when the Congress, in seeking to achieve this aim through the Robinson-Patman Act, makes it illegal (1) to sell or contract to sell goods at unreasonably low prices, (2) for the purpose of destroying competition or eliminating a competitor, it denounces an act, the illegality of which depends upon (1) a finding of unreasonableness, and (2) the design and purpose to destroy competition by, it.
>
> "So the Congress has complied with all the recognized elements by which definiteness is gauged. And the enforcement of such statute presents no greater difficulties than those which are likely to arise under the similar statutes already alluded to."

The courts have recognized the elements which go into establishing cost. You recall the opinion of Judge Yankwich goes into that in great detail. He states on pages 189 and 190 all those points—I would like to allude to some of them all the points in judging reasonability of price. He says:

> "Courts have recognized the elements which go into establishing cost, which is one of the basic facts by which price must be determined. Whether a price

[fol. 147] is high or low, and, if so, whether it is unreasonably so, can be determined by ordinary business and accountancy methods which take into consideration cost, market, usual profits and other elements. The unreasonably low prices which the statute considers an evil would rarely, if ever, be an initial price, except in the rare instance where it would relate to a product not previously marketed. In most instances, it would involve a sudden and unexpected change of price in a staple article of commerce by one engaged in a competitive field. So, in determining its character, and whether it was put into effect as a means of destroying competition, additional elements other than those already mentioned, such as cost, usual profits and the like, would be available for consideration. Among them, might be mentioned the suddenness of the price change, its relation to previous prices charged by the merchant or by others in the field, in the particular locality or elsewhere, the existence or non-existence of new economic factors relating to cost of production, demand for the article, seasonal or other, the consequent need for expansion or contraction of the field for the particular merchandise and other factors, financial or economic, which [fol. 148] might or might not warrant a precipitate reduction in price."

Now, the Court goes on to say: "And on the basis of such factors, it would be possible to submit to a jury, for its determination, the question whether (1) the price is unreasonably low, and (2) whether it was so fixed for the purpose of destroying competition. This is certainly no more difficult to determine than whether the punishment of a child by a teacher was 'unjustifiable';"—as in People v. Curtiss, 1931, in 300 P. 804—"whether the number of employees which the operator of a radio station was compelled to use exceeded what was 'needed';"—U.S. v. Petrillo, 1947, 332 U.S. 1—"whether a deducted business expense was 'reasonable' for 'income tax purposes;'"—U.S. v. Ragen (1942), 314 U.S. 513—"whether an automobile was traveling at a 'dangerous' rate of speed;"—Miller v. State of Ore., 1927,

273 U.S. 657—"whether contracts are 'reasonably calculated' or 'tend' to fix prices;"—Waters-Pierce Oil Co. v. State of Texas, (1909) 212 U.S. 86—"or whether an obstruction to navigation is 'unreasonable.'" Union Bridge Co. v. U.S., 1907, 27 S. Ct. 367, 204 U.S. [fol. 149] 364. "And when the courts could see no unwarranted delegation of legislative power to juries in any of these statutes, we can see none here."

Each one of these price cuts initiated by National on these markets here would be show. Proof would show that it was preceded by a threat of some kind, and certainly that is something the jury could take into consideration in determining whether this was an ordinary business practice, an ordinarily, unreasonably low price. There are many things which, if the proof were allowed to go forward in this case, would show that there is no question as to, at least so far as our case is concerned, that the Robinson-Patman Act is clear and prescribes a definite standard, which a court or jury can easily use in determining the guilt or innocence of the defendant here. And courts and juries and ordinary citizens understand what an unreasonably low price is. I don't think it is hard for the ordinary man. An ordinary man is an economic man. He knows a phony price when he sees one. He knows that, it would be understandable to him, that if a man had distressed merchandise, perishables of some sort, he would recognize the reason for that low price, by the man selling below his own cost. Those questions I find, are not as [fol. 150] complex as Mr. Chadwell would like the Court to think that they are.

The Court: Where is the breaking point between—assuming that a price is low—where is the breaking point between a reasonably low price and an unreasonably low price, in your eyes?

Mr. Eisen: Well, that would be dependent upon the common understanding of men ——

The Court: What is the common understanding?

Mr. Eisen: Well, where there was no other reasonable explanation for the low price. In other words, if it could be shown that all the surrounding circumstances pointed toward the fact that this was a price that was not justi-

fied by any of the business practices involved, that the price, all these ingredients which Judge Yankwich point out, he said, there is no ordinary business reason for having a price that way. If they have a reason, if the defendants, under this statute, have a reason for having a price other than the elimination of competition, they could show it. It would be very easy to show that they had so much surplus milk that they had to get rid of, or that somebody else beat them to the punch, somebody else had lowered the price and they had to meet competition.

[fol. 151] The Court: Well, do you understand that it is a requirement that to be an unreasonably low price that it must be below cost?

Mr. Eisen: No, it does not have to be below cost. That would usually be the case, and that would be one of the ingredients, but these things, in the experience of men, are not hard to interpret. I can see in something like the Cohen case, where all you had was an unreasonable price, period, or suppose it said an unreasonably high price, and it is true you would get off in an area where it would be very hard to evaluate.

The Court: Now, that is the point I am trying to get to. Why would it be any harder to determine an unreasonably high price than an unreasonably low one if one of the criteria for determining an unreasonably low price is that you don't sell below cost necessarily?

Mr. Eisen: Well, it would either be below your cost of production or so close to it that it would be an unreasonable way of doing business. In other words, all the economic factors involved would be an irrational way of doing business, if the Court follows me.

The Court: Well, I am having a little difficulty follow-
[fol. 152] ing you. There are some commodities that I can think of and some business activities where they make a net of one per cent. That is considered a fine return. There are others where the net would run up to ten, twelve and perhaps even twenty-five per cent before it is considered to be a reasonable return. Now, where is the formula coming into play which would determine an unreasonably low cost in each of those situations?

Mr. Eisen: Of course in the situation here, that we are dealing with here is of course a milk business.

The Court: Now, you are dealing with a fact. You are not dealing with the milk business, the grocery business, the automobile business or anything else. We are dealing with a fact.

Mr. Eisen: Yes. Well, in those businesses, they are businesses which have for years survived on a profit of one or two per cent, have been notoriously known to survive on businesses, on profits of that type, like the Chain Stores and so on, where their turn-over is tremendous. I think that is understandable, just as other businesses, the Drug Industry, something like that, where their usual profits are ten or twelve per cent because they need so much for research and so on, but I think all these things can [fol. 153] be brought to the attention of the jury and are understandable by a jury, just like the question of a utility or a low profit, or the question of a chemical company or the like when it is a very high profit. I think those things that can be taken into consideration.

Of course here we have the additional element and I still can't see how we can separate these two things, the purpose of the statute and the intent which must be present, to eliminate a competitor and destroy competition, taken together with the unreasonably low price. You have those two matters and there, again, I don't see how they can be separated in view of the Court's opinions in the Petrillo case, in the Goren case, in the Screws case and other cases, which say that you cannot separate the two.

The only further thing I would like to say—of course I would like to continue answering any questions that Your Honor has on that point—the only other thing I would like to say is, that if the Court was inclined to look with disfavor from the constitutionality point of view, upon that statute, that the Court follow what the courts did in the Hunt case and the Pullman case and reserve its further ruling until some later time, until after I can—

The Court: That is a matter of some concern to me. [fol. 154] I am aware of the fact that it is the practice on major constitutional questions of this kind that, where there is any doubts about it, why it is deferred.

Mr. Eisen: I would like to point out to the Court that most of the evidence, I would say almost all of the evidence in this case under the Sherman Act, or all the evidence

that would be adduced under the Robinson-Patman Act, it would be necessary to adduce the same evidence under the Sherman Act, so it wouldn't be any additional waiver for the Court and jury to sit and listen to witnesses.

Now, just one thing, the Nashville case which was mentioned. The Nashville case, of course, merely held that Section 3 did not amend the Clayton Act and Section 3 mentions only penal sanction, and it is purely criminal in effect, where the Nashville case only stands for the proposition that the Department of Justice cannot try the persons named in the Act.

The Court: Let me interpose a comment here. One time shortly after Mister Justice Whittaker reached the Supreme Court, a decision was handed down that was actually about a page and a half on the point that was being presented to the Court, and the rest of a rather lengthy [fol. 155] opinion was what could be construed as dictum. The dictum was what bothered us as trial judges, those cases as in the Jenkins case. I asked Mr. Justice Whittaker, when he was back here, what risk was involved for a trial judge, recognizing the pronouncement as dictum if he went ahead and did as he pleased, or as he thought he should do notwithstanding the dictum, and with some slight embarrassment he gave me the general idea that, under those circumstances, we operated at our peril; that the dictum, when it became a pointed issue, if it had been signalled adequately, represented what the Court would do the next time round. And under those circumstances I am somewhat more interested in the Foot notes in the Nashville case than you seem to give it in the way of importance.

Mr. Eisen: I don't believe, Your Honor, that this Foot note in the Nashville case arises to the dignity of dictum.

The Court: Perhaps not, but it arises to the dignity of a signal, such as we were discussing in connection with the Frink case that I was talking about. You know that it is more than a coincidence that they picked out as one of the Law Review citations that one where the ultimate conclu- [fol. 156] sion was that the statute was unconstitutional.

Mr. Eisen: I have tried to rather speculate—it is kind of hard to say—although you could say that the dictum is the other way. They had the opportunity, in dictum to say that, if this was before us, it would be unconstitutional.

Since they didn't say that, the dictum is that if it is constitutional. There are two sides to a point.

The Court: I can recall very few instances where, by dictum, the Supreme Court has said "if this question were before us, we would declare it unconstitutional. That at least never crops up among those opinions.

Mr. Eisen: That is true, but they could have, if they had wanted to, express it as dictum. They could have. If they wanted to go out of their way, they certainly could have been a little bit more—I just don't believe that it rises to the level of dictum.

I would like merely to say, again, that the Sherman Act has also been referred to as vague.

Thank you very much, Your Honor.

The Court: All right.

Thereupon, on behalf of Defendants, Mr. Chadwell presented a reply argument as follows:

[fol. 157] Mr. Chadwell: Your Honor, may I say a few words now or shall I wait?

The Court: I think we might as well keep these issues separate. There is not any point in getting involved in them. So if you have any further very brief comments that don't involve a re-hash of your Brief, I will be glad to hear them.

Reply Argument on Behalf of Defendants by Mr. Chadwell

Mr. Chadwell: No, no, I certainly will not re-hash the Brief in any way. I want to comment on two things only which Mr. Eisen has argued.

The first is that after all this question could be deferred and decided by the Court at some later stage, presumably at the end of the Government's case or at the end of the trial, if the Government survives a motion for a directed verdict, or sometime during the trial at least. He made a plea for the opportunity of putting in his case under these Robinson-Patman counts as well as under the Sherman counts, and went so far to say that he could put in his case on all of the counts, the Robinson-Patman counts and the Sherman Act counts, without burdening the Court

with any additional evidence that would not be required under the Sherman Act counts.

In the first place, if Your Honor please, I wish to call [fol. 158] attention to what the Court said in the Lanzetta case—it is cited in our brief—and Your Honor of course is well aware of the points from the comments that Your Honor made, how the statute which is challenged, must be tested on its face and not upon the basis of any evidence which might be introduced in support of the indictment. Obviously that is true. Certainly if we are right on our contentions, as I firmly believe we are and as I urge that we are, I do not think that it is fair to the defendants to force them to prepare this unreasonably low cost defense, which is an exceedingly difficult one, I might say, for the reason that nobody knows what the offense is—we should not be prejudiced by whatever they might choose to put in evidence with respect to this question of what is or is not an unreasonably low cost in the trial of the Sherman Act counts if we must do that. I respectfully urge upon the Court that if, as we think, this statute is unconstitutional, it will be as unconstitutional after the case as it is today, and no more and no less, because, as Your Honor has observed, it cannot be helped by any evidence that goes in with respect to this particular indictment. I think that whether or not, and urge that whether or not, it may or may not be possible to determine in the [fol. 159] milk business what is or is not an unreasonably low price is of no significance whatsoever in determining whether or not this statute on its face is or is not unconstitutional.

I urge upon the Court this point that this indictment is an exceedingly complex one at best. There are fifteen counts in this indictment. The counts, as stated by the Government in their very brief, tentative statement, involve different Sections—there are six or seven, seven different sections of geographical areas involved; there are different co-conspirators, so-called, in each one of these areas. It is a case that is going to be very complex and very difficult, for the defense at least, irrespective of the fact that the Government is trying to make it a simple one. If this statute is indeed unconstitutional, as we think it is, we urge upon the Court in justice to these defendants, that

they should not be required to defend under these sections, these counts, involving the Robinson-Patman Act.

Now, another point that he makes that I would like to refer to because I did not refer to it in my opening argument, except very briefly, and I did not refer to the case which he seems to dwell upon quite a bit. He strongly urged upon the Court that in some way or other, the in- [fol. 160] tent clause of Section 3 can make the unreasonably low price clause constitutional if, in the absence of the intent clause, it might be assumed that it would be unconstitutional.

The fact of the matter is, of course, that the fact that this unreasonable low price clause is tied to a specific purpose does not in any way mean that due process is satisfied. The one certainly cannot be used to cure the other. To say, if Your Honor please, that specification of intent or motive in any way makes the Act constitutional, when Congress prescribed two specific requirements for its violation, would, as a matter of fact, write the unreasonably low cost clause right out of the Act. That is what, in fact, counsel is contending for when he says that the specific intent clause will save the constitutionality of this Act. It won't do it.

Now, if Your Honor would like to have me do it, or would not mind, I would like to discuss this Fairmont case a little bit, which he relied upon quite some in that connection, because I had a case up in Wisconsin not long ago—it was under the Fairmont case and quite like it—and I think it is cogent of the fallacy of the argument, which counsel is making here to the effect that the specific intent provision saves the vagueness of the unreasonably [fol. 161] low price clause.

In the Fairmount case there was a statute, a Minnesota statute, which prohibited sales at different prices in different sections of the state, and that was the prohibition. It did not tie that act to any illegal or predatory intent. Now, it was clear enough under the statute what was outlawed, what was prohibited. There was no question about that. What was outlawed was sales at different prices in different sections. The Supreme Court said that, even though these particular acts are clearly enough specified, they must lapse at criminal law. There was nothing wrong with that. So in order for it to have been

outlawed, it must be tied to a specific purpose, and hence the statute was stricken. Now, the court didn't say that if you had a specific purpose that spelled out a predatory act, that that saves the statute, even though the predatory act is vague and uncertain. He tries to turn around the express holding of the Fairmont case and cases of that kind as authority for making the act constitutional because of the illegal intent, even though the Act itself is unreasonably vague and impossible to ascertain. I say that the argument he makes on that point is entirely illogical, that [fol. 162] it has no basis in the law, and that the unreasonably low price clause in this Act cannot be saved by any such device.

I am not going to labor this point any longer, Your Honor, because it is obvious. Your Honor has read our Briefs, which are elaborate, and I think I have nothing further to add to what I have just said, either here or in our Briefs, unless Your Honor has some question.

STATEMENT AND RULING BY THE COURT ON COUNTS TWO, FOUR, SIX, EIGHT, TEN, THIRTEEN AND FIFTEEN OF THE INDICTMENT DISMISSED

The Court: I have formed, as I indicated before we started this argument, I have formed a fairly definite conclusion, in my own mind, on these Robinson-Patman Acts. I have not changed that conclusion at all. I had some reluctance to take such drastic action as is contemplated by sustaining the motion to dismiss when there is some authority for deferring it. I think one reason for deferring action on motions to dismiss, which are predicated upon some constitutional question, is that the evidence itself may be of some assistance to the Court in arriving at a conclusion about a question such as this. I had hoped that, perhaps, there might have been a little bit more discussion on that particular phase of it in the arguments this morning, because it was a question that was disposed of fairly briefly in both Briefs. However, [fol. 163] there is nothing in the argument that has been presented this morning that, basically, is any different from what was presented in the Briefs, and on the basis of the Briefs I was of the opinion that the Robinson-Patman Act counts were fatally defective. It is my im-

pression that that portion of Section 3 of the Robinson-Patman Act, which is involved here, Part II I believe it is, is so vague and indefinite as to violate the Constitutional provisions relating to due process.

It is, therefore, the order that Counts Two, Four, Six, Eight, Ten, Thirteen and Fifteen of the Indictment will be dismissed.

Now, Gentlemen, before we get into the formal debate on the Motion for a Bill of Particulars, let's take about a ten or fifteen minute recess.

(Court thereupon stood at recess from 11:27 a.m., to 11:47 a.m., at which time proceedings were resumed and continued as follows:)

[fol. 164] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION

Criminal Action No. 20542

UNITED STATES OF AMERICA,

v.

NATIONAL DAIRY PRODUCTS CORPORATION AND RAYMOND J. WISE, Defendants

ORDER DISMISSING ROBINSON-PATMAN COUNTS OF INDICTMENT March 20, 1961

Be It Remembered, this 6th day of March 1961, the above entitled matter coming on for hearing before the Honorable R. Jasper Smith, one of the Judges of said court upon the motion of the defendant National Dairy Products Corporation to dismiss Counts Two, Four, Six, Eight, Ten, Thirteen, and Fifteen of the indictment and upon the motion of the defendant Raymond J. Wise to dismiss Count Thirteen of the indictment for the reason that Section 8 of the Robinson Patman Act is so vague and indefinite in its terms as to violate the Constitution of the United States and the defendants appearing by

John T. Chadwell, John H. Lashly, Richard W. McLaren, and Martin J. Purcell, and the United States of America appearing by Earl A. Jinkinson, James E. Mann, and Robert L. Eisen, and the Court having heard oral arguments on said motion and having read the briefs submitted by the respective parties and being otherwise fully advised in the premises, finds:

That the part of Section 3 of the Robinson-Patman Act (15 U.S.C. 13a) quoted herein, to wit:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, . . . to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

[fol. 165] is so vague, indefinite, and uncertain so as to violate the Fifth and Sixth Amendments to the Constitution of the United States and said counts of the indictment should be dismissed.

It Is Therefore Ordered:

That Counts Two, Four, Six, Eight, Ten, Thirteen, and Fifteen of the above entitled indictment be, and they hereby are, dismissed.

Enter:

R. Jasper Smith, United States District Judge.

Dated: March 20, 1961.

[fol. 166] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

[Title omitted]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed April 15, 1961

I. Notice is hereby given that the United States appeals to the Supreme Court of the United States from the Order entered in this action on March 20, 1961, dismissing as unconstitutional counts two, four, six, eight, ten, thirteen and fifteen of the indictment charging defendants with charging unreasonably low prices for the purpose of destroying competition and eliminating competitors in violation of 15 U.S.C. 13a.

This appeal is taken pursuant to 18 U.S.C. 3731.

II. The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States and include in said transcript the following:

A. The indictment.

B. Defendants' motions to dismiss on grounds of unconstitutionality.

C. Pp. 1-63 of the Transcript of Proceedings on Hearing Arguments on Sundry Motions, held on March 6, 1961.

D. The order of the court, entered on March 20, 1961, dismissing counts two, four, six, eight, ten, thirteen and fifteen of the indictment.

III. The following question is presented by this appeal:

Whether the last clause of section three of the Robinson-Patman Act (15 U.S.C. 13a) prohibiting the charging of [fol. 167] "unreasonably low prices for the purpose of destroying competition or eliminating a competitor" is so vague as to make its enforcement as a criminal statute

unenforceable under the Fifth and Sixth Amendments to the United States Constitution.

Earl A. Jinkinson, Chief, Chicago Office, Antitrust Division, Department of Justice. J. Edward Mann, Robert L. Eison, Attorneys.

[fols. 168-171] Certificate of Service (Omitted in Printing)

[fol. 171a] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION

[Title omitted]

ORDER EXTENDING TIME TO DOCKET APPEAL — June 6, 1961.

Upon application of the United States by motion, and for good cause shown, the United States of America is granted an additional fifteen days, to June 29, 1961, in which to docket the appeal of this case with the Supreme Court of the United States. This extension is granted pursuant to Rule 13, Revised Rules of the Supreme Court.

Dated June 6, 1961.

R. Harper Smith, U. S. District Judge.

Attest: A true copy. J. C. Eggman, Clerk, by D. D. Daniel, Jr., Deputy.

[fol. 172] Clerk's Certificate to foregoing transcript omitted in printing.

[Vol. 173] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1961

No. 173

UNITED STATES, Appellant,

vs.

NATIONAL DAIRY PRODUCTS CORP., et al.

Appeal from the United States District Court for the Western District of Missouri

ORDER NOTING PROBABLE JURISDICTION—October 9, 1961

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary calendar.

1961, and the notice of appeal was filed on April 15, 1961. The jurisdiction of this Court to review the order on direct appeal is conferred by 18 U.S.C. 3731. *United States* v. *Harriss*, 347 U.S. 612.

STATUTE INVOLVED

Section 3 of the Robinson-Patman Act, 15 U.S.C. 13a, set out in full in Appendix B, *infra*, p. 15, provides in pertinent part:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce * * * to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.
>
> Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than $5,000 or imprisoned not more than one year, or both.

QUESTION PRESENTED

Whether the provision of Section 3 of the Robinson-Patman Act making it a crime to sell goods at unreasonably low prices for the purpose of destroying competition is, as applied to sales made below cost with such purpose, unconstitutionally vague and indefinite.

STATEMENT

On September 16, 1959, the appellees were indicted in the United States District Court for the Western District of Missouri. Eight counts (counts 1, 3, 5, 7, 9, 11, 12, 14) charged National Dairy Products Corporation ("National") with conspiring to restrain

trade in violation of Section 1 of the Sherman Act, 15 U.S.C. 1; and seven counts (counts 2, 4, 6, 8, 10, 13, 15) charged it with making sales below its own cost for the purpose of destroying competition, in violation of Section 3 of the Robinson-Patman Act, 15 U.S.C. 13a. Two of the Sherman Act counts (counts 11, 12) and one of the Robinson-Patman Act counts (count 13) named Raymond J. Wise, vice-president and director of National, as a co-defendant.

The pertinent allegations of the indictment are as follows:

National is engaged in the business of purchasing, processing, distributing and selling milk and other dairy products throughout the United States (Par. 1, R. 1). Its six operating divisions include the Sealtest Division, responsible for processing and distributing milk products, which itself is broken down geographically into further divisions (Par. 5, R. 3-4).

National's milk processing plant in Kansas City, Missouri, which operates under the direction of Sealtest-Central Division, has for some years been engaged in competition with a number of national concerns and various small local dairies in the Greater Kansas City area and in a number of smaller cities and towns adjoining Kansas City in Kansas and Missouri. In each instance a local dairy has only a single bottling plant and, typically, annual sales not exceeding $300,000. A number of local dairies have sales of less than $100,000 and net assets of less than $50,000 (Pars. 6, 7, R. 4). Throughout the Greater Kansas City market, National distributes its products largely through its own employees, but in the cities and towns in Mis-

souri and Kansas outside this market it usually sells its milk in paper cartons to independent distributors who, in turn, resell the milk on their own account (Par. 8, R. 4). During the period covered by the indictment, National did not normally bottle milk in glass containers for sale in stores (Par. 9, R. 5).

The indictment (with one exception) charged parallel violations of Section 1 of the Sherman Act and Section 3 of the Robinson-Patman Act with respect to National's direct or indirect sales of milk in Kansas City and six other local markets in Missouri or Kansas. The seven Robinson-Patman Act counts each charged that over an extensive period of time National sold milk through its distributors (or, in the case of the Greater Kansas City market, directly) at unreasonably low prices for the purpose of destroying competition in the market in question (Pars. 22, 34, 46, 58, 70, 92, 104, R. 9, 13, 16, 20, 24, 31, 35). In each case, National is charged with having "utilized the advantages it possesses by reason of the fact that it operates in a great many different geographical localities in order to finance and subsidize a price war against small dairies selling milk in competition with it * * * by intentionally selling milk [directly or to its distributor in the area] at prices below National's cost" (Pars. 23, 35, 47, 59, 71, 93, 105, R. 10, 13, 17, 20, 24, 31 and 35). The effect of such practices in two cases is alleged to have been to "eliminate competition" and "to drive small dairies from" the market (Pars. 48, 106, R. 17, 35). In the other five cases, the actions of National are charged to have resulted in "severe financial losses to small dairies doing business" in the market and to have caused them to suffer losses in sales volume.

(Pars. 24, 36, 60, 72, 94, R. 10, 13, 24, 24, 32). In addition, the violations in the Greater Kansas City market, in which the defendant Wise, a vice president and director of National, is alleged to have participated as a principal (Par. 91, R. 31), assertedly resulted in forcing some small dairies to request stores selling their products to refrain from advertising or selling them at low prices in order to prevent National from starting a new price war (Par. 94; R. 32).[1]

On January 22, 1960, National moved to dismiss the seven Robinson-Patman Act counts on the ground of unconstitutional vagueness; a similar motion was filed by the defendant Wise with respect to the Robinson-Patman Act count involving him. After hearing oral argument by the parties on March 6, 1961, the district court ruled that the statute "is so vague and indefinite as to violate the Constitutional provisions relating to due process" (R. 163), and dismissed counts 2, 4, 6, 8, 10, 13 and 15. The formal order (App. A, *infra*, pp. 13-14) was entered on March 20, 1961.

THE QUESTION IS SUBSTANTIAL

"1. The third clause of Section 3 of the Robinson-Patman Act makes it a crime to sell goods "at unreasonably low prices for the purpose of destroying

---

[1] The Sherman Act counts relating to National's activities in the six specified local markets outside Greater Kansas City charged that in each case, during the same periods involved in the parallel Robinson-Patman Act counts, National's distributors were guaranteed a specific gross margin of profit, thus permitting the distributor to engage in price wars without risk of loss (see, *e.g.*, Pars. 17(b), 19(c), R. 8, 9); and that an objective and result of National's actions was to restrict or eliminate the sales of milk in glass gallon containers by the small dairies in these communities in competition with the milk sold by National or its distributors in paper cartons (see, *e.g.*, Pars. 17(c), 19(b), R. 8-9).

INDEX

	Page
Opinion below	1
Jurisdiction	1
Statute involved	2
Question presented	2
Statement	2
The question is substantial	5
Conclusion	12
Appendix A	13
Appendix B	15

CITATIONS

Cases:

Alabama State Federation of Labor v. *McAdory*, 325 U.S. 450	6
Ben Hur Coal Co. v. *Wells*, 242 F. 2d 481	8
Boyce Motor Lines v. *United States*, 342 U.S. 337	7
Cline v. *Frink Dairy Co.*, 274 U.S. 445	10
F. & A. Ice Cream Co. v. *Arden Farms Co.*, 98 F. Supp. 780	11
Federal Trade Commission v. *Anheuser-Busch, Inc.*, 363 U.S. 536	9
Jordan v. *DeGeorge*, 341 U.S. 223	6
Liverpool, N.Y. & P.S. Co. v. *Emigration Comm'rs*, 113 U.S. 33	6
Marbury v. *Madison*, 1 Cranch 137	6
Moore v. *Mead's Fine Bread Co.*, 348 U.S. 115	9
Muller, E. B. v. *Federal Trade Commission*, 142 F. 2d 511	9
Nash v. *United States*, 229 U.S. 373	7, 9, 10
Nashville Milk Co. v. *Carnation Co.*, 355 U.S. 373	11
Porto Rican American Tobacco Co. v. *American Tobacco Co.*, 30 F. 2d 234	9
Roth v. *United States*, 354 U.S. 476	11
Screws v. *United States*, 325 U.S. 91	7, 10, 11
United Public Workers v. *Mitchell*, 330 U.S. 75	6
United States v. *Cohen Grocery Co.*, 255 U.S. 81	10
United States v. *Harriss*, 347 U.S. 612	2, 6, 11
United States v. *Petrillo*, 332 U.S. 1	10, 11
United States v. *Ragen*, 314 U.S. 513	8, 10
United States v. *Raines*, 362 U.S. 17	6, 11

Constitution and statutes:

	Page
United States Constitution:	
Fifth Amendment	6
Sixth Amendment	6
Lever Anti-Profiteering Act, 41 Stat. 297	10
Robinson-Patman Act, Section 3, 49 Stat. 1526, 15 U.S.C. 13a	1, 2, 3, 4, 5, 6, 8, 9, 11, 15
Sherman Act, Section 1, 15 U.S.C. 1	3, 4

Miscellaneous:

80 Cong. Rec. 6332	9
Price Discrimination, Hearings before Subcommittee of Senate Judiciary Committee on S. 4171, 74th Cong., 2d Sess.	9

In the Supreme Court of the United States

OCTOBER TERM, 1961

No.

UNITED STATES OF AMERICA, APPELLANT

v.

NATIONAL DAIRY PRODUCTS CORP., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

JURISDICTIONAL STATEMENT

OPINION BELOW

The district court rendered no opinion. Its order dismissing the counts of the indictment charging violation of Section 3 of the Robinson-Patman Act is set forth in Appendix A, *infra*, pp. 13-14.

JURISDICTION

The counts of the indictment involved in this appeal were filed under Section 3 of the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13a. The order of the district court, dismissing these counts as based on an unconstitutional statute, was entered on March 20,

competition or eliminating a competitor." App. B, *infra*, p. 15. The district court held that this provision is so "vague, indefinite, and uncertain" as to violate the Fifth and Sixth Amendments. We submit, however, that at least as applied to the acts charged in this indictment—selling below cost for the purpose of destroying competition—the Act is constitutional.

It is, of course, settled doctrine that the Court decides only the specific constitutional question presented by the particular record, since "[t]he delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases [that may be] imagined." *United States* v. *Raines*, 362 U.S. 17, 22. See also, *e.g.*, *Alabama State Federation of Labor* v. *McAdory*, 325 U.S. 450, 461; *United Public Workers* v. *Mitchell*, 330 U.S. 75, 89-90; *Liverpool, N. Y. & P. S. Co.* v. *Emigration Comm'rs*, 113 U.S. 33, 39; *Marbury* v. *Madison*, 1 Cranch 137, 179-80. The essential question, therefore, is whether the proscriptions of the statute are too vague and indefinite to give a person of ordinary intelligence fair notice that the acts charged by *this* indictment are forbidden by law. See *United States* v. *Harriss*, 347 U.S. 612, 617; *Jordan* v. *DeGeorge*, 341 U.S. 223, 230-32.

The offenses with which appellants were charged under Section 3 involved two elements: (a) sales below cost and (b) the purpose of destroying competition or eliminating a competitor. No businessman could rationally doubt that such sales, made with this intent, violated the statute.

(a) The requirement that the prosecution prove the "purpose of destroying competition, or eliminating a

competitor" is sufficient to relieve the statute of any objection that it punishes without warning conduct which the accused might reasonably suppose to be lawful. The quoted words are sufficiently definite. *Nash* v. *United States*, 229 U.S. 373. One who sets a low price for that purpose challenges the traditional anti-trust policy. He cannot complain if he is prosecuted therefor, since, at best, he "deliberately goes perilously close to an area of proscribed conduct * * * [and] take[s] the risk that he may cross the line" (*Boyce Motor Lines* v. *United States*, 342 U.S. 337, 340). This should be enough to meet the charge of unconstitutional vagueness where there is no lack of standards by which the judge or jury may measure the application of the statute to the defendant's conduct. As pointed out in Mr. Justice Douglas' opinion in *Screws* v. *United States*, 325 U.S. 91, 101-102, in which three other members of the Court joined:

> The Court, indeed, has recognized that the requirement of a specific intent to do a prohibited act may avoid those consequences to the accused which may otherwise render a vague or indefinite statute invalid. The constitutional vice in such a statute is the essential injustice to the accused of placing him on trial for an offense, the nature of which the statute does not define and hence of which it gives no warning. See *United States* v. *Cohen Grocery Co.*, *supra*. But where the punishment imposed is only for an act knowingly done with the purpose of doing that which the statute prohibits, the accused cannot be said to suffer from

lack of warning or knowledge that the act which he does is a violation of law. The requirement that the act must be willful or purposeful may not render certain, for all purposes, a statutory definition of the crime which is in some respects uncertain. But it does relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware."

There are, of course, situations in which sales below cost may have a legitimate commercial objective. They may be made to dispose of excess inventory or obsolete or spoiling merchandise, or for the purpose of meeting an equally low price of a competitor. But there can be no doubt as to the legality of such conduct, since the Act covers only sales made for the purpose of destroying competition or eliminating a competitor. Section 3 cannot "become a trap for those who act in good faith" (*United States* v. *Ragen*, 314 U.S. 513, 524), so long as the only sales at unreasonably low prices that it condemns are those made for predatory purposes. See *Ben Hur Coal Co.* v. *Wells*, 242 F. 2d 481, 486 (C.A. 10).

(b) In the present case we need not rely solely upon the requirement and allegation of a purpose to destroy competition or injure a competitor. The statutory phrase defining the other element of the crime, sales at "unreasonably low prices," when read in the context of the national policy of preserving conditions conducive to competition, plainly covers the appellees' conduct, *i.e.*, sales below cost made with predatory intent. And the reference to antitrust policy is explicitly supplied by the requirement of a "purpose of destroy-

ing competition, or eliminating a competitor.". This is sufficiently definite to support a criminal prosecution. *Nash v. United States, supra.* The legislative background removes any conceivable ground for uncertainty. Although its deliberations upon Section 3 were primarily concerned with price discriminations, Congress was informed that destruction of competition or elimination of a competitor could also result from "unreasonable price cutting offensive to the competitive principle". *Price Discrimination*, Hearings before Subcommittee of Senate Judiciary Committee on S. 4171, 74th Cong., 2d Sess., p. 64; see also *id.* at pp. 85-86. The ban in the third clause of Section 3 on selling at unreasonably low prices was particularly directed against selling below cost, when done with the objective of driving competitors out of business or otherwise injuring competition. *Id.* at pp. 14, 18, 53-54; 80 Cong. Rec. 6332. This Court has recognized that below-cost sales made for a predatory purpose typify the unreasonably low prices at which this part of the Robinson-Patman Act was directed. *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115, 119-20; Cf. *Federal Trade Commission v. Anheuser-Busch, Inc.*, 363 U.S. 536, 552; *E. B. Muller v. Federal Trade Commission*, 142 F. 2d 511 (C.A. 6); *Porto-Rican American Tobacco Co. v. American Tobacco Co.*, 30 F. 2d 234, 237 (C.A. 2). Consequently, no reasonably intelligent person in the appellees' situation could have failed to know that the sales below cost charged in the indictment fell within the ambit of the phrase "unreasonably low prices," whatever might be its uncertainty in other applications.

In the court below, appellees relied on various cases in which criminal statutes containing a standard of "reasonableness" were held unconstitutional for vagueness. The leading case, which appellees urged is controlling here, is *United States* v. *Cohen Grocery Co.*, 255 U.S. 81. There, the Court invalidated the provision of the Lever Anti-Profiteering Act (41 Stat. 297) that prohibited any "unjust or unreasonable rate or charge" for necessaries. The Court ruled (p. 89) that this provision did not provide "an ascertainable standard of guilt" because it left open "the widest conceivable inquiry" and in substance "merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury." The vice of that statute (and of comparable statutes invalidated in the other cases upon which appellees relied, such as *Cline* v. *Frink Dairy Co.*, 274 U.S. 445) was not its use of the "reasonableness" standard as such, but its failure to relate this standard to any more precise rules of conduct discernible from either the legislative or historical background of the legislation. See *Nash* v. *United States*, 229 U.S. 373, 377; *Cline* case, *supra*, at 460-465; *Screws* v. *United States*, *supra*, at 95-96, 101-102; *United States* v. *Petrillo*, 332 U.S. 1, 7-8; *United States* v. *Ragen*, 314 U.S. 513.

In the present case, however, the standard of "unreasonably low prices" does provide "an ascertainable standard of guilt" (*Cohen*, *supra*), first, because it covers such sales only when made to destroy competition or eliminate a competitor, and, second, because, whatever may be its exact contines, it plainly prohibits predatory pricing at less than cost. In these circum-

stances, Section 3 is no more vague or ambiguous than many other federal statutes whose constitutionality has been sustained. See *United States* v. *Harriss*, 347 U.S. 612, 624, n. 15.

The possibility that the "unreasonably low prices" provision of Section 3 would give rise to serious constitutional difficulties in other situations[2] is no basis for invalidating the statute as applied to an indictment charging sales below cost designed to eliminate competition. See *United States* v. *Petrillo*, 332 U.S. 1, 7-8; *Roth* v. *United States*, 354 U.S. 476, 491-492; *United States* v. *Raines*, 362 U.S. 17, 20-26. Whatever may be the outer limits of the third clause of Section 3, we submit that when the appellees intentionally sold below cost for the purpose of destroying competition, they were under "fair warning" (*Screws* v. *United States*, *supra*, at 104) that they were thereby violating the statutory prohibition against making sales for that purpose "at unreasonably low prices."

2. The constitutionality of this provision of the Robinson-Patman Act plainly presents an important question calling for resolution by this Court. While there have been few criminal prosecutions under this provision, the paucity is not a true measure of its importance. Its mere existence has been a significant deterrent throughout the 25 years since the statute was enacted.

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[2] *See Nashville Milk Co.* v. *Carnation Co.*, 355 U.S. 373, 378, n. 7. We are not, of course, conceding that to be constitutional the statute must be construed as limited to sales below cost. It may also be properly applicable to sales at prices above cost that are nevertheless, in common understanding, uncommonly low in relation to the seller's customary price levels. *See F. & A. Ice Cream Co.* v. *Arden Farms Co.*, 98 F. Supp. 180, 189-190 (S.D. Calif.).

CONCLUSION

The question presented by this appeal is substantial and important. Probable jurisdiction should be noted.

Respectfully submitted,

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JUNE, 1961.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION.

CRIMINAL ACTION NO. 20542

UNITED STATES OF AMERICA,

v.

NATIONAL DAIRY PRODUCTS CORPORATION and RAYMOND J. WISE, DEFENDANTS

ORDER DISMISSING ROBINSON-PATMAN COUNTS OF INDICTMENT

Be it remembered, this 6th day of March, 1961, the above-entitled matter coming on for hearing before the Honorable R. Jasper Smith, one of the Judges of said court upon the motion of the defendant National Dairy Products Corporation to dismiss Counts Two, Four, Six, Eight, Ten, Thirteen, and Fifteen of the indictment and upon the motion of the defendant Raymond J. Wise to dismiss Count Thirteen of the indictment for the reason that Section 3 of the Robinson-Patman Act is so vague and indefinite in its terms as to violate the Constitution of the United States and the defendants appearing by John T. Chadwell and John H. Lashly, Esquire, and the United States of America appearing by Earl A. Jinkinson, James E. Mann, and Robert L. Eisen, and the Court, having heard oral arguments on said motion and having read the briefs submitted by the respective parties and being otherwise fully advised in the premises, finds:

That the part of Section 3 of the Robinson-Patman Act (15 U.S.C. § 13a) quoted herein, to wit:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce * * *

> to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

is so vague, indefinite, and uncertain so as to violate the Fifth and Sixth Amendments to the Constitution of the United States and said counts of the indictment should be dismissed.

IT IS THEREFORE ORDERED:

That Counts Two, Four, Six, Eight, Ten, Thirteen, and Fifteen of the above-entitled indictment be, and they hereby are, dismissed.

ENTER:

s R. JASPER SMITH,
United States District Judge.

Dated: MARCH 20, 1961.

APPENDIX B

Section 3 of the Robinson-Patman Act, 49 Stat. 1528, 15 U.S.C. 13a, reads as follows:

Discrimination in rebates, discounts, or advertising service charges; underselling in particular localities; penalties.

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than $5,000 or imprisoned not more than one year, or both.

Office-Supreme Court, U.S.
FILED
JUL 26 1961
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

NO. 13

UNITED STATES OF AMERICA, *Appellant*

v.

NATIONAL DAIRY PRODUCTS CORPORATION
and
RAYMOND J. WISE, an individual, *Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

MOTION TO DISMISS OR AFFIRM

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INDEX

	PAGE
Question Presented	2
Grounds for Dismissal:	
Failure to Comply with the Court's Rules	2
A. The Change in the Question Presented Is Substantial and Prejudices Appellees	2
B. The New Question Is Unrelated to the Terms and Circumstances of the Case	3
Grounds for Affirmance:	
The Question Is Unsubstantial	5
A. The Constitutional Principles Applicable to the Appeal Are Settled and Require Affirmance of the Judgment Below	5
B. The Construction Urged in the Jurisdictional Statement Would Result in Legislation by the Court	9
C. The Appeal Presents No Important Federal Question	11
Conclusion	12

CITATIONS

PAGE

CASES:

Automatic Canteen Company of America v. Federal Trade Commission, 346 U.S. 61 (1953) 10, 12

Cline v. Frink Dairy Company, 274 U.S. 445 (1927) 6

Collins v. Kentucky, 234 U.S. 634 (1914) 6

Connally v. General Construction Company, 269 U.S. 385 (1926) 6

F. & A. Ice Cream Co. v. Arden Farms Co., 98 F. Supp. 180 (D.C.S.D. Calif. 1951) 10

International Harvester Company v. Kentucky, 234 U.S. 216 (1914) 6

Jordan v. DeGeorge, 341 U.S. 223 (1951) 4

Lanzetta v. New Jersey, 306 U.S. 451 (1939) 4

Musser v. Utah, 333 U.S. 95 (1948) 7

Nash v. United States, 229 U.S. 373 (1913) 8

Nashville Milk Co. v. Carnation Company, 355 U.S. 373 (1958) 6, 11

Screws v. United States, 325 U.S. 91 (1945) 7, 8

United States v. Cardiff, 344 U.S. 174 (1952) 7

United States v. L. Cohen Grocery Company, 255 U.S. 81 (1921) 6, 7, 8

United States v. Harriss, 347 U.S. 612 (1954) 4

United States v. Petrillo, 332 U.S. 1 (1947) 10

United States v. Ragen, 314 U.S. 513 (1942) 12

Winters v. New York, 333 U.S. 507 (1948) 7

PAGE

MISCELLANEOUS:

Clark, "Statutory Restrictions on Selling Below Cost," 11 VAND. L. REV. 105 (1957) 8, 11

Comment, 55 MICH. L. REV. 845 (1957) 6, 8

Edwards, MAINTAINING COMPETITION 162 (1949) 8, 11

Note, 9 INTRA. L. REV. (N.Y.U.) 239 (1954) .. 8

Note, 100 U. OF PENN. L. REV. 1058 (1952) ...8, 11, 12

Note, 108 U. OF PENN. L. REV. 116 (1959) 12

PALAMOUNTAIN, THE POLITICS OF DISTRIBUTION (1955) 10

PRICE DISCRIMINATION, Hearings before Subcommittee of Senate Judiciary Committee on S. 4171, 74th Cong., 2nd Sess. 10

REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS (1955) 7, 11, 12

REPORT OF SHERMAN ACT SUBCOMMITTEE ON COST DATA PROBLEMS IN SHERMAN ACT CASES, 17 ABA: SECTION OF ANTITRUST LAW 519 (1960) 11

REPORT TO THE FEDERAL TRADE COMMISSION BY THE ADVISORY COMMITTEE ON COST JUSTIFICATION (1956) 10

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

NO. 173

UNITED STATES OF AMERICA, *Appellant*

v.

NATIONAL DAIRY PRODUCTS CORPORATION
and
RAYMOND J. WISE, an individual, *Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

MOTION TO DISMISS OR AFFIRM

Appellees move, pursuant to paragraph 1 a of Rule 16 of the Revised Rules of this Court, that the Appeal herein be dismissed, and as grounds therefore state: (A) the Jurisdictional Statement (hereafter cited "J.S.") violates paragraph 1 (c) (2) of the Court's Rules 15, because the substance of the question presented has been changed from that set forth in the Notice of Appeal and appellees have been prejudiced thereby; (B) the Jurisdictional Statement violates paragraph 1 (c) (1) of Rule 15 because it does not deal with the question presented by the Notice of Appeal

and because the new question is not "expressed in the terms and circumstances of the case."

In the alternative appellees move, pursuant to paragraph 1(c) of Rule 16 of the Revised Rules of this Court, that the judgment of the district court be affirmed.

QUESTION PRESENTED

The question presented on the record in this case, correctly stated in the Notice of Appeal, is whether the "unreasonably low prices" clause of Section 3 of the Robinson-Patman Act is so vague as to make its enforcement as a criminal statute unconstitutional. In the Jurisdictional Statement, however, the Solicitor General has abandoned the Government's defense of the statutory language and has substituted a question new to these proceedings, that is, whether the disputed clause is fatally vague and indefinite "as applied to sales made below cost" (J.S. 2).

GROUNDS FOR DISMISSAL: FAILURE TO COMPLY WITH THE COURT'S RULES

A. The Change in the Question Presented Is Substantial and Prejudices Appellees

Had the Notice of Appeal revealed the intention to innovate on appeal an interpretation of the indictment not offered below, we would have designated those portions of

the record showing unequivocally the novelty of that interpretation. But the "question presented" was changed after the record had been designated in accordance with the question argued to the district court. This substantial shift in position has prejudiced appellees by precluding designation, for example, of the Government's brief below opposing our motion to dismiss the Robinson-Patman counts. Although that brief, which was relied upon by the district court (R. 163), contains the detailed and comprehensive statement of the Government's position, it does not assume or assert the indictment to delimit a "below cost" fact situation.

B. The New Question Is Unrelated to the Terms and Circumstances of the Case

Even if the new question had been properly presented in the Notice of Appeal, it would be subject to dismissal because it is not the question presented by the record in this case.

It is settled that "if on its face the challenged provision is repugnant to the due process clause [in that it is so vague as not to give notice of what conduct is prohibited], specification of details of the offense intended to be charged would not serve to validate it. . . . It is the statute, not the accusation under it, that prescribes the rule to govern conduct and

warns against transgression." *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453 (1939).[1]

Thus Government counsel below had no alternative at law but to defend the statute on its face. Moreover, on the basis of the indictment itself they could have taken no other position. Each Robinson-Patman count contains a paragraph charging, in the exact words of the statute, sales at unreasonably low prices for the purpose of destroying competition (Paragraphs 22, 34, 46, 58, 70, 92, 104; R. 9, 13, 16, 20, 24, 31, 35; see J.S. 4). Although subsequent paragraphs give notice that one kind of evidence the Gov-

[1] With one exception the cases cited for the contrary proposition (J.S. 6) do not involve statutes challenged for vagueness. In that one, *United States* v. *Harriss*, 347 U.S. 612 (1954), the irrelevance of the terms of the information was a point on which the majority and minority were agreed. Speaking for the majority, Mr. Chief Justice Warren wrote (347 U.S. at 617):

> "Our review . . . is limited to a decision on the alleged 'invalidity' of the statute on which the information is based. In making this decision, *we judge the statute on its face*. See *United States* v. *Petrillo*, 332 U.S. 1, 6, 12." (Emphasis added.)

Similarly, for the minority Mr. Justice Douglas concluded that "the question . . . is not what the information charges nor what the proof might be. It is whether the statute itself is sufficiently narrow and precise as to give fair warning." 347 U.S. at 629.

(In *Jordon* v. *DeGeorge*, 341 U.S. 223 (1951) the majority did not view vagueness as the issue (341 U.S. at 229) but, turning to that question in deference to the minority, held that the case fell into a general category of activity clearly described by the statutory words, not vice versa (341 U.S. at 232).)

ernment hopes to adduce is of sales knowingly made at "prices below [appellee National's cost," on the basis of this indictment there is nothing whatsoever to indicate that the evidence would be limited to such prices, nor did Government trial counsel ever suggest that they recognize such a limitation or consider it acceptable. On the contrary, counsel below fully recognize that the indictment, repeating verbatim the disputed statutory clause, is as broad — and as vulnerable — as the statute itself (see R. 150-152).

Accordingly, the "question presented" by the Jurisdictional Statement is not "expressed in the terms and circumstances" of this case. We submit that the Government's failure to comply with the Rules of this Court is "sufficient reason for dismissing the appeal" (Rule 10, Paragraph 2(c)).

GROUNDS FOR AFFIRMANCE: THE QUESTION IS UNSUBSTANTIAL

A. The Constitutional Principles Applicable to the Appeal Are Settled and Require Affirmance of the Judgment Below.

In a case of first impression the constitutional issue posed by the Appeal could not be called unsubstantial. At this juncture, however, it presents no novel or doubtful question. The criminal proscription against "unreasonably low prices," struck down by the court below, is in substance identical to the Lever Act (prohibiting the wilful and felo-

nious making of unreasonable rates and charges for necessities) which the Court voided because it did not provide "an ascertainable standard of guilt . . . adequate to inform persons accused of violation thereof of the nature and cause of the accusation against them." *United States* v. *L. Cohen Grocery Company*, 255 U.S. 81, 89 (1921).

The *Cohen* precedent is not isolated nor outmoded. The Court reached the same conclusion with respect to legally indistinguishable criminal statutes in *International Harvester Company* v. *Kentucky*, 234 U.S. 216 (1914) ("market value under fair competition, and under normal market conditions"); *Collins* v. *Kentucky*, 234 U.S. 634 (1914) (same); *Cline* v. *Frink Dairy Company*, 274 U.S. 445 (1927) ("reasonable profits"); *Connally* v. *General Construction Company*, 269 U.S. 385 (1926) ("current rate of per diem wages in the locality"). Recently it recognized the current validity of this line of decisions as pertinent to the "unreasonably low prices" clause. Characterizing that clause as "this vague provision," Mr. Justice Harlan observed (*Nashville Milk Co.* v. *Carnation Company*, 355 U.S. 373, 378 (1958)):

> "The District Court indicated that the vagueness of the 'unreasonably low prices' provision might give rise to constitutional difficulties, if such questions had to be faced. Cf. *United States* v. *L. Cohen Grocery Co.*, 255 U.S. 81; *Cline* v. *Frink Dairy Co.*, 274 U.S. 445. See Comment, 55 Mich. L. Rev. 845, 853-856."

Indeed, "doubts besetting [the provision's] constitutionality seem well founded; no gloss imparted by history or adjudication has settled the vague contours of this harsh criminal law." REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 201 (1955).

Here, as below, the Government would divert attention from the determinative fact that the challenged clause "forbids no specific or definite act" *United States* v. *L. Cohen Grocery Company*, 255 U.S. 81, 89 (1921)) by leaping to discussion of the motive for the still inscrutable deed. But "legislation may run afoul of the Due Process Clause [not only] because it fails to give adequate guidance to those who would be law-abiding, but also because it fails to advise defendants of the nature of the offense with which they are charged, or to guide courts in trying those who are accused." *Musser* v. *Utah*, 333 U.S. 95, 97 (1948); see also *United States* v. *Cardiff*, 344 U.S. 174, 176 (1952); *Winters* v. *New York*, 333 U.S. 507, 515-516 (1948). It is with respect to the nature of the crime and, as the district court could readily appreciate, the guidance to trial courts, that the "unreasonably low prices" clause is most obviously deficient.

Screws v. *United States*, 325 U.S. 91 (1945), relied upon by the Government, shows explicitly and emphatically that a particular intent, even criminal scienter, can-

not fulfill the requirements of due process where "no overt act is laid" (*Nash* v. *United States*, 229 U.S. 373, 378 (1913)): "We repeat that the presence of a bad purpose or evil intent alone may not be sufficient [325 U.S. at 103] . . . willful conduct cannot make definite that which is undefined." 325 U.S. at 105.[2]

Particularly should this cogent admonition be observed here where the motive made suspect by the statute is not patently culpable (cf. *Screws* v. *United States*, 325 U.S. 91 at 96, 101 (1945)) but differs only in indeterminate degree from the normal competitive motive on which our free economy is premised. Note, 100 U. of Penn. L. Rev. 1058, 1062 (1952); Comment, 55 Mich. L. Rev. 845, 854-855 (1957); cf. Edwards, Maintaining Competition 162 (1949) ("Any concern that reduces prices probably does so principally in the hope of taking some business away from competitors. . . . Local price reductions . . . are . . . to be expected, even though the concern instituting them is not cracking the whip over its competitors"); Clark, "Statutory Restrictions on Selling Below Cost," 11 Vand. L. Rev. 105, 113-119 (1957); Note, 9 Intra. L. Rev. (N.Y.U.) 239, 244 (1954).

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[2] Were the law otherwise, the *Cohen* statute could also have been saved; in *Cohen* as in *Screws* the statute involved required that the wrongdoing be "wilful", the difference being that in *Screws* the forbidden act was "made definite by [reference to] decision or other rule of law . . ." 325 U.S. at 103, 96.

By consistent construction of the phrase "unreasonably low prices" to mean "sales below cost" the Jurisdictional Statement implicitly acknowledges that, regardless of any specification of intent, the "unreasonably low prices" clause, if judged on its face, must fall (see J.S. 11). Thus in effect the Government concedes the correctness of the decision it is asking this Court to hear and reverse.

B. The Construction Urged in the Jurisdictional Statement Would Result in Legislation by the Court

Since, as we have shown (*supra*, pp. 2-5), there is no legal or factual basis for the "below cost" limitation urged by the Government, it is apparent that the Court is being asked capriciously to construe "unreasonably low prices" to mean "prices below cost." This is not suggested as a connotation of the statutory language; rather it is offered as a putative derivation from legislative history (J.S. 9).

We know of no case in which this Court has looked to legislative history (as it might were the words merely ambiguous) to give definiteness to a statute on its face "void for vagueness." But should the Court do so here, it would find only that the fragmentary selections offered in the Jurisdictional Statement (at p. 9) are, if possible, more vague than the clause itself.[3]

[3] Nor do they tend to support the proposition for which they are cited; indeed, one reference is to the testimony of a small businessman who averred that sales "below cost" are often normal

We submit that if Congress had meant "prices below cost" it would have said so. Contrast *United States* v. *Petrillo*, 332 U.S. 1, 7 (1947). The very different language actually used suggests both that Congress had in mind some criterion other than "cost," i.e., "unreasonableness," and that it did not consider all prices "below cost" to be "unreasonable." Therefore the construction urged by the Government would violate the Congressional intent; its adoption would amount, contrary to the fixed principles of this Court, to judicial legislation.[4]

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and necessary economic behavior. PRICE DISCRIMINATION, HEARINGS BEFORE SUBCOMMITTEE OF SENATE JUDICIARY COMMITTEE ON S. 4171, 74th Cong., 2nd Sess., p. 53. "[T]he Borah-Van Nuys amendment [which became the section that includes the "unreasonably low prices" clause] resulted from the inability of the Senate to agree on policy when confronted with the conflicting demands of independents, manufacturers, and mass distributors." PALAMOUNTAIN, THE POLITICS OF DISTRIBUTION 228, 231 (1955).

[4] It should be noted that such legislation would be extremely controversial. "Cost" is itself a vague and unworkable standard. The Court in connection with other sections of the Robinson-Patman Act has acknowledged the "elusiveness of cost data" (346 U.S. at 68) and, in the absence of a clear Congressional directive, has resisted imposing the burden of such proof or disproof on defendants, even in civil actions. *Automatic Canteen Company of America* v. *Federal Trade Commission*, 346 U.S. 61 (1953). Accountants, belying Judge Yankwich's thesis that "cost accountancy has reached the exactness of a science" (*F. & A. Ice Cream Co.* v. *Arden Farms Co.*, 98 F. Supp. 180, 189 (D.C.S.D. Calif. 1951)), are in accord. REPORT TO THE FEDERAL TRADE COM-

C. The Appeal Presents No Important Federal Question

The *Nashville* case settled that, whether or not constitutional, the challenged clause will not support a private action. The Court, after commenting on its doubtful constitutionality, found it "worthy of note that the Department . . . has never, so far as we have been able to determine, brought proceedings under this provision . . ." *Nashville Milk Co.* v. *Carnation Company*, 355 U.S. 373, 378 (1958). This the Government concedes (J.S. 11); indeed, so far as we can find, in the 23 years to the time of the filing of the indictment in this case, the Department made virtually no use of it. See REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 199-

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MISSION BY THE ADVISORY COMMITTEE ON COST JUSTIFICATION (1956); cf. Note, 100 U. OF PENN. L. REV. 1059, 1061 (1952). Most of the state legislatures that have enacted "sales below cost" statutes have found it necessary to define "cost," and to do so rather arbitrarily. CLARK, "Statutory Restrictions on Selling Below Cost," 11 VAND. L. REV. 105, 119-125 (1957). Economists do not talk generally of "cost" but distinguish precisely among many kinds of costs, each of which may, but usually does not—depending on a host of factors such as the time period involved, the play of supply and demand, the efficiency of the particular competitor, the liquidity of assets, the state of inventories, technological development, seasonal variations, the type of business involved—have a recognizable relationship to a given price. Cf. "Report of Sherman Act Subcommittee on Cost Data Problems in Sherman Act Cases," 17 ABA: SECTION OF ANTITRUST LAW 519, 525, 1960); EDWARDS, MAINTAINING COMPETITION 162 (1949).

200 (1955); Note, 103 U. of Penn. L. Rev. 116, 122 (1959).

We do not suggest that disuse determines unconstitutionality. But certainly it implies unworkability (contrast *United States* v. *Ragen*, 314 U.S. 513, 523-524 (1942)) and consequent unimportance as an instrument of public policy.[5] The Appeal presents therefore, no controversy of far reaching significance but simply an attempt to test the Department's right to use a provision for which it has not before found any real use, an attempt possibly inspired by the Court's recent warning of doubtful constitutionality.

CONCLUSION

For the reasons stated, appellees respectfully urge that the Appeal be dismissed. In the alternative, as the question presented is unsubstantial, appellees submit that the judg-

[5] If, as the Government without substantiation asserts (J.S. 11), the clause has been a significant deterrent, it may well have been in the direction of price rigidity, thus undermining the public antitrust policy. Note, 100 U. of Penn. L. Rev. 1058, 1062 (1952); cf. *Automatic Canteen Company of America* v. *Federal Trade Commission*, 346 U.S. 61, 74 (1953). The Attorney General's Committee concluded that "it does not serve the public interest of antitrust policy." Report of the Attorney General's National Committee to Study the Antitrust Laws 201 (1955).

ment of the district court should, without further argument, be affirmed.

Dated: July 26, 1961

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 173

UNITED STATES OF AMERICA, APPELLANT

v.

NATIONAL DAIRY PRODUCTS CORP., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

Appellees base their motion to dismiss on a claim that there is a variance between the question presented in the government's Jurisdictional Statement and that set out in the notice of appeal, filed April 15, 1961. In the notice of appeal the question put was:

> Whether the last clause of section 3 of the Robinson-Patman Act (15 U.S.C. 13a) prohibiting the charging of "unreasonably low prices for the purpose of destroying competition or eliminating a competitor" is so vague as to make

> its enforcement as a criminal statute unenforceable under the Fifth and Sixth Amendments to the United States Constitution.

This question, as worded in the Jurisdictional Statement, reads:

> Whether the provision of section 3 of the Robinson-Patman Act making it a crime to sell goods at unreasonably low prices for the purpose of destroying competition is, as applied to sales made below cost with such purpose, unconstitutionally vague and indefinite.

More concisely, the question in the notice of appeal was "Whether the Act is unconstitutional," while the question in the Jurisdictional Statement was "Whether the Act is unconstitutional, as applied to this indictment."

We think it clear that the limitation made in the Jurisdictional Statement constitutes no prejudicial variance in contravention of Rule 15(1)(c)(2), and that the question, as there stated, is the one presented by this case. Under the controlling decisions of this Court, the limitation on the question made in the Jurisdictional Statement would be compelled irrespective of whether the appellant articulated it in the notice of appeal or the Jurisdictional Statement. For the constitutionality of a criminal statute may be decided only in the context of the indictment challenged, and the question of whether Section 3 of the Robinson-Patman Act is "on its face" unconstitutionally vague must accordingly be determined with respect to the sales below cost conduct charged in the

indictment, rather than on the basis of some hypothetical charge not here in issue. See *Roth* v. *United States*, 354 U.S. 476, 491-92; *United States* v. *Harriss*, 347 U.S. 612, 617; cf. *United States* v. *Fruehauf*, 365 U.S. 146, 157; *United States* v. *Lem Hoy*, 330 U.S. 724, 725; *United States* v. *Halseth*, 342 U.S. 277, 278-9. See, also, *Barrows* v. *Jackson*, 346 U.S. 249, 255-58 (general discussion of scope of rule that party cannot invoke constitutional rights of others).

As to appellee's motion to affirm on the ground that there is no substantial federal question, we believe that it is sufficient to note that to the best of our knowledge there is no situation in which this Court has refused the government's request to give plenary review to a decision of a lower court holding a statute of Congress unconstitutional.

The question is substantial and properly before the Court. Probable jurisdiction should be noted.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

AUGUST 1961

U. S. GOVERNMENT PRINTING OFFICE, 1961 603927 137

INDEX

	Page
Opinion below	1
Jurisdiction	1
Statute involved	2
Question presented	3
Statement	3
Summary of argument	6
Argument:	
I. The prohibition in Section 3 of the Robinson-Patman Act against selling at unreasonably low prices for the purpose of destroying competition is constitutional as applied to sales below cost for that purpose	9
A. Section 3 of the Robinson-Patman Act prohibits sales below cost for the purpose of destroying competition	9
B. As applied to sales below cost for the purpose of destroying competition, Section 3 is not unconstitutionally vague or indefinite	18
II. Since Section 3 is constitutional as applied to the sales below cost charged in this indictment, there is no occasion for the Court to consider its constitutionality as applied to other situations	32
Conclusion	35

CITATIONS

Cases:	
Alabama State Federation of Labor v. *McAdory*, 325 U.S. 450	33
American Tel. & Tel. Co. v. *United States*, 299 U.S. 232	25, 32
American Tobacco Co. v. *United States*, 328 U.S. 781	13
Att'y Gen. for B.C. v. *Att'y Gen. for Can.*, [1937] A.C. 368	16
Bandini Petroleum Co. v. *Superior Court*, 284 U.S. 8	25
Barrows v. *Jackson*, 346 U.S. 249	33
Ben Hur Coal Co. v. *Wells*, 242 F. 2d 481	10, 11
Berger v. *United States*, 200 F. 2d 818	26
Blackwell Journal Pub. Co., 23 F.T.C. 413	23

Cases—Continued

	Page
Boyce Motor Lines, Inc. v. *United States*, 342 U.S. 337	18, 19, 20, 21, 27, 32
Cline v. *Frink Dairy Co.*, 274 U.S. 445	28
Cramp v. *Board*, No. 72, this Term, decided December 11, 1961	19, 20, 35
E. B. Muller & Co. v. *Federal Trade Commission*, 142 F. 2d 511	23
F. & A. Ice Cream Co. v. *Arden Farms Co.*, 98 F. Supp. 180	22, 23
Federal Trade Commission v. *Anheuser-Busch, Inc.*, 363 U.S. 536	14
Federal Trade Commission v. *Beech-Nut Packing Co.*, 257 U.S. 441	20
Gorin v. *United States*, 312 U.S. 19	31
Kaumagraph Co., 20 F.T.C. 1	24
Koehler v. *United States*, 342 U.S. 852	31
Lethbridge v. *Northern Trusts Co.*, [1925] D.L.R. 422	16
Lock Joint Pipe Co., 27 F.T.C. 709	23
McGowan v. *Maryland*, 366 U.S. 420	26
Miller v. *Oregon*, 273 U.S. 657	26
Moore v. *Mead's Fine Bread Co.*, 348 U.S. 115	14
Nash v. *United States*, 229 U.S. 373	19, 25
Nashville Milk Co. v. *Carnation Co.*, 355 U.S. 373	11, 16, 17
Noma Electric Corp., 15 F.T.C. 87	24
Porto Rican American Tobacco Co. v. *American Tobacco Co.*, 30 F. 2d 234	13
R. v. *Howard* (Police Ct., South Burnaby, B.C., March 19, 1958)	16
R. v. *Ray* (Police Ct., South Burnaby, B.C., December 11, 1957)	16
Ratner v. *California*, 321 U.S. 755	26
Robinson v. *United States*, 324 U.S. 282	33
Screws v. *United States*, 325 U.S. 91	30, 32
Smith v. *California*, 361 U.S. 147	20
Sproles v. *Binford*, 286 U.S. 374	18, 19, 27
Thornhill v. *Alabama*, 310 U.S. 88	34, 35
United Public Workers v. *Mitchell*, 330 U.S. 75	33
United States v. *A. B. Dick Co.*, 1948–49 Trade Cas., ¶62,233	24
United States v. *American Tobacco Co.*, 221 U.S. 106	13
United States v. *Classic*, 313 U.S. 299	31

Cases—Continued

	Page
United States v. *Cohen Grocery Co.*, 255 U.S. 81	27, 28, 29, 30
United States v. *Corn Products Refining Co.*, 234 Fed. 964	13, 21, 22
United States v. *Fairmont Foods Co.* (Crim. 3634, W.D. Mich., June 23, 1959)	23
United States v. *Fruehauf*, 365 U.S. 146	33
United States v. *Harriss*, 347 U.S. 612	33
United States v. *Leiner*, 143 F. 2d 298	26
United States v. *Libby-Owens-Ford Glass Co.*, 1948-49 Trade Cas. ¶62,323	24
United States v. *Petrillo*, 332 U.S. 1	18, 20, 21, 26, 32, 34, 35
United States v. *Polk & Co.*, 1955 Trade Cas. ¶67,993	24
United States v. *Rabon*, 314 U.S. 513	18, 19, 20, 21, 24, 29, 31
United States v. *Raines*, 362 U.S. 17	33
United States v. *Safeway Stores, Inc.* (Crim. 9584, N.D. Tex., June 18, 1957)	23
United States v. *Safeway Stores, Inc.*, 20 F.R.D. 451	23
United States v. *Safeway Stores, Inc.*, 1958 Trade Cas. ¶68,871	24
United States v. *Spector*, 343 U.S. 169	27, 32
United States v. *Western Newspaper Union*, 1960 Trade Cas. ¶69,709	24
United States v. *Wise*, No. 488, this Term, pending on Jurisdictional Statement	6
Waters-Pierce Oil Co. v. *Texas (No. 1)*, 212 U.S. 86	25
Williams v. *United States*, 341 U.S. 97	31
Winters v. *New York*, 333 U.S. 507	18

Statutes:

Clayton Act, 38 Stat. 730, as amended, 15 U.S.C. 12, *et seq.*:	
Sec. 2	7, 13, 14
Sec. 14	6
Federal Trade Commission Act, 38 Stat. 717, as amended, 15 U.S.C. 41, *et seq.*, Sec. 5	17, 23
Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13, *et seq.*, Sec. 3	2, 3, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 20, 21, 22, 23, 24, 28, 29, 30, 32, 34, 35

Statutes—Continued

Page

Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1, *et seq*. 3, 5, 6, 13, 19, 22, 25
British North America Act, 30–31 Vict. c. 3. 16
Can. Rev. Stat. c. 314, § 33A. 15, 23
25–26 Geo. V. c. 56, § 9 (Can.). 15

Miscellaneous:

Canada Restrictive Trade Practices Commission, *Report Concerning the Wholesale Trade in Cigarettes and Confectionery in the Edmonton District*. 23
80 Cong. Rec.:
3112. 15
3113. 15
6332. 15
6346. 15
6348. 15
6436. 16
9416. 15
H.R. 8442, 74th Cong., 2d sess. 15
H.R. 10235, 86th Cong., 2d sess. 17
H. Rep. 627, 63d Cong., 2d sess. 14
H. Rep. 2951, 74th Cong., 2d sess. 16
Hearings on S. 4171 Before a Subcommittee of the Senate Judiciary Committee, 74th Cong., 2d sess. 15, 16
Hearings on H.R. 10235 Before a Subcommittee of the House Interstate & Foreign Commerce Committee, 86th Cong., 2d sess. 17, 18
S. 3154, 74th Cong., 2d sess. 15
S. 4171, 74th Cong., 2d sess. 15
S. Rep. 1502, 74th Cong., 2d sess. 15

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 173

UNITED STATES OF AMERICA, APPELLANT

v.

NATIONAL DAIRY PRODUCTS CORP., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

BRIEF FOR THE UNITED STATES

OPINION BELOW

The district court rendered no opinion in dismissing the counts of the indictment charging violations of Section 3 of the Robinson-Patman Act. The court's oral statement, made when it granted the motion to dismiss those counts, is set forth at R. 121–122.

JURISDICTION

The counts of the indictment involved in this appeal were filed under Section 3 of the Robinson-Patman Act, 49 Stat. 1525, 15 U.S.C. 13a. The order of the district court, dismissing these counts as based on an unconstitutional statute, was entered on March 20, 1961 (R. 122–123). The notice of appeal was

filed on April 15, 1961 (R. 124–125), and probable jurisdiction was noted on October 9, 1961 (R. 126). The jurisdiction of this Court rests on the Criminal Appeals Act, 18 U.S.C. 3731.

STATUTE INVOLVED

Section 3 of the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13a, provides as follows:

> *Discrimination in rebates, discounts, or advertising service charges; underselling in particular localities; penalties.*
>
> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.
>
> Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than $5,000 or imprisoned not more than one year, or both.

QUESTION PRESENTED

Whether the provision of Section 3 of the Robinson-Patman Act making it a crime to sell goods at unreasonably low prices for the purpose of destroying competition, as applied to sales made below cost with such purpose, is unconstitutionally vague and indefinite.

STATEMENT

On September 16, 1959, the appellees were indicted in the United States District Court for the Western District of Missouri (R. 1–33). Eight counts (counts 1, 3, 5, 7, 9, 11, 12 and 14) charged National Dairy Products Corporation ("National") with conspiring to restrain trade in violation of Section 1 of the Sherman Act, 26 Stat. 209, 15 U.S.C. 1; seven counts (counts 2, 4, 6, 8, 10, 13 and 15) charged it with making sales below cost for the purpose of destroying competition, in violation of Section 3 of the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13a. Two of the Sherman Act counts (counts 11 and 12) and one of the Robinson-Patman Act counts (count 13) named Raymond J. Wise, a vice-president and director of National, as a co-defendant.

The pertinent allegations of the indictment are as follows:

National is engaged in the business of purchasing, processing, distributing and selling milk and other dairy products throughout the United States (R. 1). For the past several years National, which has a milk processing plant in Kansas City, Missouri, has been in competition with national concerns and various

small local dairies, both in the Greater Kansas City area and in a number of smaller cities and towns adjoining Kansas City in Kansas and Missouri (R. 4). Each of the local dairies has only a single bottling plant and, typically, annual sales not exceeding $300,000 (R. 4). A number of local dairies have sales of less than $100,000 and net assets of less than $50,000 (R. 4). Throughout the Greater Kansas City market, National distributes its products largely through its own employees, but in the cities and towns in Missouri and Kansas outside this market it usually sells its milk in paper cartons to independent distributors who, in turn, resell the milk on their own account (R. 4). During the period covered by the indictment, National did not normally bottle milk in glass containers for sale in stores (R. 4–5).

The indictment charged violations of Section 3 of the Robinson-Patman Act with respect to National's direct or indirect sales of milk in Kansas City and six local markets in Missouri or Kansas. It alleged that during stated periods National sold milk through its distributors (or, in the case of the Greater Kansas City market, directly) at unreasonably low prices for the purpose of destroying competition in the market in question (R. 9, 12, 15, 18–19, 22, 28–29, 32). In each market, National is charged with having "utilized the advantages it possesses by reason of the fact that it operates in a great many different geographical localities in order to finance and subsidize a price war against small dairies selling milk in competition with it * * * by intentionally selling milk [directly or to its distributor in the area] at prices below National's

cost" (R. 10, 12, 15–16, 19, 22, 29, 32). The effect of such practices in two instances has been to "eliminate competition" and "to drive small dairies from" the market (R. 16, 32). In the other five areas, the actions of National have resulted in "severe financial losses to small dairies doing business" in the market and have caused them losses in sales volume (R. 9, 12, 19, 22, 29). In addition, the violations in the Greater Kansas City market (in which the defendant Wise participated as a principal (R. 28)), have forced some small dairies to request stores selling their products to refrain from advertising or selling them at low prices, in order to prevent National from starting a new price war (R. 29).[1]

On January 22, 1960, National moved to dismiss the seven Robinson-Patman Act counts on the ground that the statute is unconstitutionally vague; a similar motion was filed by the defendant Wise with respect to the Robinson-Patman Act count involving him. After hearing oral argument by the parties on March 6, 1961, the district court ruled from the bench that the statute "is so vague and indefinite as to violate the Constitutional provisions relating to due process"

[1] The Sherman Act counts charged violations relating to National's activities in the six specified local markets outside Greater Kansas City. It was alleged that in each case, during the same periods involved in the parallel Robinson-Patman Act counts, National's distributors were guaranteed a specific gross margin of profit, thus permitting the distributor to engage in price wars without risk of loss (see, *e.g.*, R. 7, 8); and that an objective and result of National's actions was to restrict or eliminate the sale of milk in glass gallon containers by the small dairies in these communities in competition with the milk sold by National or its distributors in paper cartons (*ibid.*).

(R. 122), and dismissed counts 2, 4, 6, 8, 10, 13 and 15. The formal order of dismissal (R. 122–123) was entered on March 20, 1961.[2]

SUMMARY OF ARGUMENT

I

A. The indictment charged that National intentionally sold milk below cost in seven markets for the purpose of destroying competition, and subsidized the price war by its operations in other areas. Such sales below cost are clearly within the prohibition in Section 3 of the Robinson-Patman Act against selling "at unreasonably low prices for the purpose of destroying competition."

The words "unreasonably low prices" plainly cover sales at prices below cost when made with the purpose of destroying competition. Businesses are run for profit and, according to normal standards of the business community, any price below cost is "unreasonably low" unless justified by the exigencies of a special situation. The basic purpose of the Robinson-Patman Act was to prevent predatory pricing practices which are destructive of competition. An obvious example of such practices is selling below cost by a large and powerful firm for the purpose of driv-

[2] The district court subsequently dismissed counts 11 and 12 as to appellee Wise, on the ground that a corporate official may not be prosecuted under Section 1 of the Sherman Act for antitrust violations committed in his corporate capacity, but only under Section 14 of the Clayton Act. The government has appealed to this Court from the dismissal of those counts as to Wise. *United States* v. *Wise*, No. 488, this Term, pending on Jurisdictional Statement.

ing a weaker firm out of business or forcing it to cease competing in price with the large firm.

The pernicious effect upon competition of predatory sales below cost has long been recognized by the courts. The legislative history of the original Clayton Act shows that Congress recognized that such selling below cost should be prohibited. In enacting the Robinson-Patman Act, Congress intended to strengthen the Clayton Act, and the legislative history of Section 3 of Robinson-Patman shows that Congress there intended to prohibit selling below cost for a predatory purpose.

B. As applied to the sales below cost charged in this indictment, Section 3 fully satisfies the constitutional requirement that a statute be sufficiently definite to give persons adequate warning of what conduct is criminal, and to provide judges and juries with adequate standards for identifying the proscribed conduct. This Court has recognized the need for generalized criteria in the antitrust field. Common usage and understanding are enough to inform business management that selling below cost constitutes selling at an unreasonably low price unless abnormal business circumstances compel operations at a loss; and they are enough to inform it that a purpose of destroying competition is not a valid justification. Many antitrust decisions have made clear the unreasonableness of predatory below-cost selling; the legislative history of Section 3 and its predecessor statutes shows the purpose of Congress to ban the practice. Businesses commonly are fully aware of the relationship of their prices to their costs,

and determination of the level of costs has never presented unfamiliar or insuperable problems of proof. Section 3, moreover, penalizes sales below cost only when they are made for the purpose of destroying competition, and this Court has often held that a statute is not too vague when it applies only to conduct motivated by a specific intent to accomplish a prohibited purpose.

Section 3 is no more indefinite than many other statutes which this Court has upheld against charges of unconstitutional vagueness. The use of such terms as "reasonable" or "unreasonable" has been held valid when, as Section 3 is here applied, they were comprehensible both to potential defendants and to the courts. The Court has also upheld as sufficiently definite other standards of criminality framed in general terms of no greater specificity than "reasonableness."

II

Since Section 3 is constitutional as applied to the sales below cost charged in this indictment, there is no occasion for the Court to consider its constitutionality as applied to other situations. A litigant may challenge the validity of a statute only as applied to him, and it has been this Court's consistent practice to decide constitutional questions only on the basis of the precise facts before it. If a statute is constitutional as applied, the Court will not look beyond the particular case before it to consider the statute's validity in other peripheral situations. Appellees' argument that Section 3 is invalid "on its face" is but another way of saying that its constitutionality should be determined

in the abstract, rather than as applied to the particular sales below cost here charged.

ARGUMENT

I

THE PROHIBITION IN SECTION 3 OF THE ROBINSON-PATMAN ACT AGAINST SELLING AT UNREASONABLY LOW PRICES FOR THE PURPOSE OF DESTROYING COMPETITION IS CONSTITUTIONAL AS APPLIED TO SALES BELOW COST FOR THAT PURPOSE

The counts of the indictment dismissed by the district court charged (1) that, for the purpose of destroying competition, appellee National intentionally sold milk in various markets at prices below its cost; and (2) that such sales were made in the course of a "price war against small dairies selling milk in competition with [National] and its distributor," which National had "finance[d] and subsidize[d]" with the "advantages it possesses by reason of the fact that it operates in a great many different geographical localities." (R. 9, 12, 15–16, 19, 22, 28–29, 32.) We submit that such sales below cost fall within the statutory prohibition in Section 3 of the Robinson-Patman Act against selling at unreasonably low prices for the purpose of destroying competition, and that, as applied to such sales, Section 3 is not unconstitutionally vague.

A. SECTION 3 OF THE ROBINSON-PATMAN ACT PROHIBITS SALES BELOW COST FOR THE PURPOSE OF DESTROYING COMPETITION

1. The third clause of Section 3 of the Robinson-Patman Act makes it a crime to sell goods

> at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

Selling below cost in the absence of special circumstances is explicable only as part of a campaign to destroy competition; and it inevitably will have that effect. Small and weak concerns cannot hope to endure against a strong competitor who undertakes to sell at a loss. If such loss-selling is intended to stop price competition, the weak firms must either soon capitulate to the demands of the big competitor and raise their prices, or go under. If it is intended to drive the weak firms out of business, the plan is almost certain to succeed if the predatory price-cutter has sufficient economic strength to outlast his weaker rivals. The need or opportunity to destroy competition cannot be invoked as a justification which makes a price below cost reasonable. On the contrary, it is plain from the proscription of sales at unreasonably low prices "for the purpose of destroying competition or eliminating a competitor" that this element of gain to the seller is not a permissible factor in judging the question of reasonableness. Indeed, the seller's predatory intent is the very core of the illegal acts proscribed by Section 3.

The statutory words thus plainly cover sales at prices below cost when made with the purpose of destroying competition. Businesses are run for profit. Selling prices are ordinarily unacceptable if they fall below the level at which a business can operate profitably over any substantial period. Any price below cost is therefore "unreasonably low," according to normal standards of the business community, unless justified by the exigencies of a special situation.

These considerations were noted in *Ben Hur Coal Co.* v. *Wells*, 242 F. 481, 486 (C.A. 10), a private

treble damage action under Section 3. There the court recognized the "economic facts of life" that businesses do not "deliberately and consistently sell at a loss without some ulterior motive." It concluded that such sales below cost, made "without competitive compulsion," are at "unreasonably low prices," and that the seller "is vulnerable to the inference" that he had "the proscribed purpose of destroying competition or eliminating a competitor."[3]

To be sure, there are special situations where sales below cost have a legitimate commercial function. They may dispose of excess inventory, of obsolete or spoiling merchandise, or of merchandise in a line which the seller no longer wishes to produce or distribute; they may be made to introduce a new product or to break into a new market; or they may be designed to retain a customer by meeting in good faith the equally low price of a competitor. But as long as such sales are not designed to destroy competition or eliminate a competitor, they are not prohibited by Section 3. Where, however, there is no valid business justification for sales below cost—the situation presented in the present case, since the indictment charges that the sales were made to destroy competition—they constitute a particularly aggravated threat to competition. They are precisely the kind of anticompetitive practices that Congress considered to pose so serious a

[3] The *Ben Hur* case (and other private actions under section 3 cited in this brief) were decided before this Court held, in *Nashville Milk Co.* v. *Carnation Co.*, 355 U.S. 373, that a private action cannot be maintained for violation of that section.

threat to our economy as to warrant the imposition of criminal penalties (see *infra,* pp. 12–17). They plainly constitute sales at "unreasonably low prices" under Section 3.

The clear application of the statute to sales below cost cannot be obscured by the conceptual problems that arise in applying the phrase "unreasonably low prices" in other situations. For example, the determination whether particular prices are "unreasonably low" may be made solely on a dollars and cents basis—that is, by examining the relationship between such prices and the seller's costs, the seller's normal price structure, and the general price levels in the market or industry. Under this theory, a price might be unreasonably low yet not be illegal because the sales did not violate the second element of the statute, *i.e.* they were not made at such prices for the purpose of destroying competition or eliminating a competitor. On the other hand, the concept of "unreasonably low" prices may call for broadening the focus to cover the element of predatory purpose and may include such factors as the reasons why a low price was adopted, the expected period for which such price will be in effect, and its probable or intended impact upon competition. But the Court need not concern itself with those analytical questions in the present case. Under either analysis the prohibition in Section 3 against selling at unreasonably low prices for the purpose of destroying competition covers sales below cost when made for such purpose.

2. The whole history of antitrust law confirms our reading of Section 3. Selling below cost, on the part

of large firms, has long been recognized both by the courts and by Congress as a particularly effective—and hence a particularly pernicious—method of destroying competition. In one of the landmark early Sherman Act cases, *United States* v. *American Tobacco Co.*, 221 U.S. 106, 160–161, this Court held that an inference that the company had intended to monopolize was justified by the fact, among others, that it had initiated price wars in which it sold below cost, "[a]s a result of [which] it sustained severe losses * * *." See, also, *American Tobacco Co.* v. *United States*, 328 U.S. 781, 807. Similarly in *United States* v. *Corn Products Refining Co.*, 234 Fed. 964 (S.D.N.Y.), another early Sherman Act case, District Judge Learned Hand rested his conclusion that there was an illegal combination which had attempted "to drive out weaker competitors" (p. 1013) on the fact, among others, that the principal defendant had sold below cost (pp. 989–990). See, also, *Porto Rican American Tobacco Co.* v. *American Tobacco Co.*, 30 F. 2d 234, 237 (C.A. 2), holding that a seller violated Section 2(a) of the original Clayton Act by selling below cost in a particular market, pursuant to a "design and plan to put [its competitor there] out of business," using "some real or fancied wrong * * * as an excuse to proceed against and eliminate a weaker competitor."

When Congress passed the original Clayton Act in 1914, it, too, recognized that selling below cost should be prohibited as a dangerous device for destroying competition. The House Committee report on the

Act stated (H. Rep. 627, 63d Cong., 2d sess., p. 8, emphasis added):

> Section 2 of the bill * * * is expressly designed with the view of correcting and forbidding a common and widespread unfair trade practice whereby certain great corporations and also certain smaller concerns * * * have heretofore endeavored to destroy competition and render unprofitable the business of competitors by selling * * * at a less price in the particular communities where their rivals are engaged in business than at other places throughout the country * * *. In the past it has been a most common practice of great and powerful combinations engaged in commerce * * * to lower prices of their commodities, *oftentimes below the cost of production,* in certain communities and sections where they had competition, with the intent to destroy and make unprofitable the business of their competitors * * *.

The 1936 Robinson-Patman amendments were designed to "strengthen the Clayton Act provisions" (*Federal Trade Commission* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 543–544). This Court has stated, in a case based in part upon Section 3 of the Robinson-Patman Act, that "Congress by the Clayton Act and Robinson-Patman Act barred the use of interstate business to destroy local business" through predatory price-cutting by which "[t]he profits made in interstate activities would underwrite the losses of local price-cutting campaigns." *Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 115, 119, 120. The indictment in this case charges precisely such predatory conduct. It alleges that National is engaged in the milk business "throughout the

United States" (R. 1); that it sold below cost in seven specified markets for the purpose of destroying competition in each of those markets (R. 9, 12, 15–16, 19, 22, 28–29, 32); and that it "finance[d] and subsidize[d]" its "price war[s] against small dairies selling milk in competition with it" through its operations "in a great many different geographical localities" (*ibid.*). Plainly, such sales below cost were at "unreasonably low prices," as that phrase is used in Section 3 of the Robinson-Patman Act.

3. The view that predatory sales below cost are prohibited by Section 3 is further supported by the legislative history of the Robinson-Patman Act itself. One of the chief aims of the legislation was to strengthen, and thus to make more effective, the various prohibitions of the Clayton Act on geographic price discrimination, including the ban on predatory selling below cost. S. Rep. 1502, 74th Cong., 2d sess., p. 4; 80 Cong. Rec. 3112, 3113, 6332, 9416; cf. *id.* at 6346. As originally introduced in both the House and Senate, the bill that became the Robinson-Patman Act did not contain the provisions of Section 3. H.R. 8442, S. 3154, 74th Cong., 2d sess. That section first appeared as part of a Senate bill (S. 4171), introduced by Senators Borah and Van Nuys, and proposed by Senator Borah as an amendment to the original House bill (80 Cong. Rec. 6348).[4]

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[4] The Borah-Van Nuys bill appears to have been largely copied from the Canadian price discrimination law, Can. Rev. Stat. c. 314, § 33A, enacted in 1935 as Section 498A (later Section 412) of the Criminal Code, 25–26 Geo. V. c. 56, § 9. See Hearings on S. 4171 Before a Subcommittee of the Senate Judiciary Committee, 74th Cong., 2d sess., p. 63. Although

The Senate held hearings on the Borah-Van Nuys bill. While those hearings were primarily concerned with price discrimination, there was also testimony relating to sales below cost made with the objective of driving competitors out of business or otherwise injuring competition. Hearings on S. 4171 Before a Subcommittee of the Senate Judiciary Committee, 74th Cong., 2d sess., pp. 14, 18, 64, 85–86. Senator Borah himself stated that his bill was intended "to stop" "selling at less than cost." *Id.*, p. 53. The Senate passed the original House Bill with the Borah-Van Nuys amendment (80 Cong. Rec. 6436) and the Conference Committee adopted the amendment as Section 3 of the Act (H. Rep. 2951, 74th Cong., 2d sess.). Thus the legislative history shows that, although Congress did not focus primarily on sales below cost during its consideration of the Robinson-Patman Act, it consciously dealt with this specific problem.[5]

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the law was upheld, *Att'y Gen. for B.C.* v. *Att'y Gen. for Can.*, [1937] A.C. 368 (P.C.), as a constitutional exercise of Dominion power under the federal-provincial jurisdictional allocation of the British North America Act, 30–31 Vict. c. 3, Canadian experience with the "unreasonably low prices" clause has been limited. We know of only two prosecutions brought under the clause, in both of which the defendants were acquitted on the merits. *R.* v. *Ray* (Police Ct., South Burnaby, B.C., December 11, 1957, unreported); *R.* v. *Howard* (Police Ct., South Burnaby, B.C., March 19, 1958, unreported). In neither opinion does it appear that the statute was challenged as vague and indefinite, although the Canadian courts have the power to refuse enforcement to statutes too vague to be properly enforced. See, *e.g.*, *Lethbridge* v. *Northern Trusts Co.*, [1925] D.L.R. 422 (Sup. Ct. App. Div. Alberta).

[5] In the *Nashville* case (355 U.S. at 382), the Court referred to an explanatory statement concerning Section 3 made

In sum, the words of Section 3, read against the background of antitrust history and in the light of the evidence of specific legislative concern with sales below cost, make it plain that sales below cost made for the purpose of destroying competition fall within the category of sales at unreasonably low prices proscribed by the legislation.

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by Representative Patman, in testifying in 1950 before a Congressional Committee, as "noteworthy, by way of epitomizing the conclusions to be drawn from the legislative history * * *." In the present case, a recent statement by Representative Patman before a Congressional Committee similarly confirms the view that Section 3 covers predatory sales below cost.

In 1960 Representative Patman introduced one of twenty-six identical bills (H.R. 10235, 86th Cong., 2d sess.) to amend the Federal Trade Commission Act explicitly to make certain of the acts prohibited by Section 3 unfair competitive practices within the meaning of Section 5 of the Trade Commission Act, and to provide a private right of action for damages and injunctive relief based on such practices. Among those practices is the sale of "goods at unreasonably low prices * * * where the effect of such sale may be * * * to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such unreasonably low prices." The bill further defines a sale at an unreasonably low price to "include any sale * * * at a price below cost as such term is defined by the law" of the state in which the product is to be consumed, or, if no such law is applicable, at a price below fully-distributed cost.

In hearings on the bill (Hearings on H.R. 10235 Before a Subcommittee of the House Interstate and Foreign Commerce Committee, 86th Cong., 2d sess.), Rep. Patman stated (p. 15) that his bill was designed to supply a private right of action for damages for violations of Section 3 which this Court in *Nashville Milk*, *supra*, held non-existent: that the *Nashville* holding had denied "small and independent business concerns" the right "to use Section 3 * * * in proceedings against unlawful selling at unreasonably low prices—even at prices below cost * * *" (p. 9): and that below-cost selling "appear[s] to

B. AS APPLIED TO SALES BELOW COST FOR THE PURPOSE OF DESTROYING COMPETITION, SECTION 3 IS NOT UNCONSTITUTIONALLY VAGUE OR INDEFINITE

1. The constitutional requirement of definiteness in criminal statutes serves two purposes: (1) it insures that persons will be given adequate warning of what conduct is criminal and thus enable them to conform their behavior to the requirements of the law; and (2) it provides juries and judges with adequate standards for identifying the proscribed conduct and imposing criminal sanctions according to rule. *Boyce Motor Lines, Inc.* v. *United States,* 342 U.S. 337, 340; *United States* v. *Petrillo,* 332 U.S. 1, 7; *United States* v. *Ragen,* 314 U.S. 513, 524; *Sproles* v. *Binford,* 286 U.S. 374, 393.

Legislatures necessarily use generic and inclusive terms to cover categories of proscribed behavior. The general terms must then be interpreted and applied both by the persons regulated and by the enforcing tribunals. Such a limitation inheres in language itself. It would be futile for the legislature to try to predict and describe multifarious specific situations; any such attempt is doomed to failure or would inevitably lead, by omission or evasion, to greater arbitrariness. The constitutional requirement is merely that there be a "reasonable degree of certainty." *Boyce Motor Lines, Inc.,* v. *United States, supra,* 342 U.S. at 340; *Winters* v. *New York,* 333 U.S. 507, 524–

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be in violation of Section 3 * * * *" (p. 10). Rep. Patman described his bill as "contain[ing] an example of some things included within the term 'unreasonably low prices,' namely, sales below cost," a term which was "first used" in Section 3, "which * * * contains no example nor definition of the term" (p. 31).

526 (Mr. Justice Frankfurter, dissenting). There will always remain some uncertainty to be resolved by the judgment of judge or jury. But, as Mr. Justice Holmes stated, in upholding the constitutionality of criminal penalties for violation of the Sherman Act's prohibition of unreasonable restraints of trade, "the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death." *Nash* v. *United States,* 229 U.S. 373, 377.

This Court's decisions applying the constitutional requirement of definiteness express the governing criteria. The terms of a statute are appraised for amenability to the "ready comprehension" of the persons affected and the tribunal, *United States* v. *Ragen,* 314 U.S. 513, 524, and for "susceptib[ility to] objective measurement," *Cramp* v. *Board,* No. 72, this Term, decided December 11, 1961, slip opinion, p. 8. The law is viewed as explained by "common usage and understanding" and "common experience," including the background and objectives of the particular prohibition, and the experience under it. *Boyce Motor Lines, Inc.* v. *United States,* 342 U.S. 337, 340–342, quoting *Sproles* v. *Binford,* 286 U.S. 374, 393; *United States* v. *Ragen, supra.* Common law tradition may remove undue ambiguity. See *Nash* v. *United States, supra,* 229 U.S. at 377. It is significant, in support of the statute, that "[c]learer and more precise language" cannot be posed which would achieve

the valid legislative purpose. *United States* v. *Petrillo*, 332 U.S. 1, 7. A statute is ordinarily not invalid merely because it may require a person to desist from some possibly lawful conduct in order to assure his compliance with the law, since it is not unfair "to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line." *Boyce Motor Lines, Inc.* v. *United States*, 342 U.S. 337, 340.[6] The constitution is satisfied if the words do not "become a trap for those who act in good faith" and provides "a practical guide to permissible conduct." *United States* v. *Ragen*, 314 U.S. 513, 523, 524.

2. We submit that under these criteria Section 3, as here applied to sales below cost, is clearly valid. Congress was dealing with an evil which has appeared in many contexts and for which general prohibitory language was therefore appropriate. Cf. *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U.S. 441, 453. The evil was predatory price-cutting by companies with widespread interests and great market power, concerns which could subsidize a price war against a smaller competitor in a limited market. As already noted, *supra*, pp. 12–17, the clearest case was continued selling at a loss, not justified by market circumstances and with predatory intent.[7]

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[6] A higher degree of definiteness may be required where the lawful conduct that might be deterred by the statute involves rights protected by the First Amendment. *Cramp* v. *Board*, *supra*, p. 10; *Smith* v. *California*, 361 U.S. 147, 151. See *infra*, pp. 34–35.

[7] Although this case presents only the application of Section 3 to sales below cost, we believe that the statute was properly framed in terms of "unreasonably low prices." Experience

Section 3 gave appellees adequate warning that, if they sold below cost for the purpose of destroying competition, they were violating the prohibition against selling at unreasonably low prices for that purpose. "[C]ommon usage and understanding" (*Boyce Motor Lines* v. *United States*, 342 U.S. 337, 340–341) are enough to inform the management of a business that selling at a loss constitutes selling at unreasonably low prices unless there are abnormal business circumstances which justify the losing operations. Section 3 gives plain evidence that the purpose to destroy competition is not a justification, but rather is the heart of the violation. Thus, the avoidance of this plain violation of Section 3 was not beyond the "ready comprehension" (*United States* v. *Ragen*, 314 U.S. 513, 524) of National's management. All it had to do was to sell above cost, a normal business objective, or to justify losses by business exigencies other than the wish to injure competitors.

Determining appellees' guilt or innocence under the statute will be easily within the competence of judge and jury. Common understanding, together with prior experience in cases dealing with predatory price-cutting under other statutes, demonstrate that "sales below cost" and the possible justifications therefor are susceptible to judicial proof, just as they are to a businessman's knowledge.

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had shown that, in some circumstances, sales at or above cost could be found to be unreasonably low if made with a predatory purpose. See, *e.g.*, *United States* v. *Corn Products Refining Co.*, 234 Fed. 963, 1010–11 (S.D.N.Y.). It is difficult to see how a "more precise" standard could have been written. Cf. *United States* v. *Petrillo*, 332 U.S. 1. See *infra*, note 8, pp. 22–23.

Business accounts are kept to measure the profit and loss of operations vis-a-vis costs. The corporate books themselves are likely to be important evidence in showing that sales were made below cost. Here, the charge is that National "intentionally" sold below its cost. The indictment itself suggests, therefore, that proof will be taken from corporate documents of which National had specific knowledge. The same proof was relied on by Judge Learned Hand in *United States* v. *Corn Products Refining Co.*, 234 Fed. 964 (S.D.N.Y.), in upholding in a Sherman Act civil case a charge of selling at unreasonably low prices with a predatory purpose. In that case, the corporate accounts (p. 990) were supplemented by intracorporate communications showing management's contemporaneous understanding (p. 989), historic industry pricing patterns (pp. 988–989), and the expert opinion of those familiar with the industry (p. 991). Similarly, in upholding the constitutionality of Section 3, Judge Yankwich (who has had extensive experience assessing evidence in antitrust cases) pointed out that the problems of proof of cost, as well as of other pertinent factors, could be resolved by using "ordinary business and accountancy methods." *F. & A. Ice Cream Co.* v. *Arden Farms Co.*, 98 F. Supp. 180, 189 (S.D. Cal.).[8]

[8] Indeed, Judge Yankwich believed that no insurmountable or unfamiliar problem would be presented by the statutory standard of "unreasonably low" even when applied to sales above cost made with the purpose of destroying competition. In his view, the usual case would involve a "sudden and unexpected change of price" in which cost and the market circumstances would show the reasonableness of the price and the

The Federal Trade Commission has experienced no great difficulty in assessing the evidence and upholding charges of sales below cost with predatory intent as unfair competitive practices under Section 5 of the Federal Trade Commission Act. *E. B. Muller & Co.* v. *Federal Trade Commission*, 142 F. 2d 511 (C.A. 6); *Blackwell Journal Pub. Co.*, 23 F.T.C. 413; *Lock Joint Pipe Co.*, 27 F.T.C. 709. Defendants indicted for selling below cost under the unreasonably low price provision of Section 3 have been sufficiently aware of the meaning of such a charge to plead guilty, *United States* v. *Fairmont Foods Co.* (Crim. 3634, W.D. Mich., June 23, 1959, unreported), and *nolo contendere*, *United States* v. *Safeway Stores, Inc.* (Crim. 9584, N.D. Tex., June 18, 1957, unreported) (see 20 F.R.D. 451, accepting the defendants' plea).

Moreover, defendants in other antitrust cases apparently have anticipated no difficulty in obeying a prohibition on selling below cost for the purpose of destroying competition, since they have signed consent decrees containing such a prohibition, both

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intent of the defendant. 98 F. Supp. at 189–190.

The Canadian experience similarly indicates the workability of the standards established by Section 3. The Restrictive Trade Practices Commission, in investigating certain allegations of unreasonably low prices violating the statute on which Section 3 was modeled, see *supra*, note 4, has displayed no difficulty in assessing evidence of costs and average profit margins for the industry in general and the investigated firm in particular (respecting both the low-priced products and others marketed in a similar manner). *Report Concerning the Wholesale Trade in Cigarettes and Confectionery in the Edmonton District*, pp. 53–60.

in suits brought by the United States under the Sherman Act (*e.g., United States* v. *Safeway Stores, Inc.*, 1957 Trade Cas. ¶ 68,871 at 73,531 (N.D. Tex.); *United States* v. *Polk & Co.*, 1955 Trade Cas. ¶ 67,993 at 70,226–27 (E.D. Mich.); *United States* v. *Western Newspaper Union*, 1960 Trade Cas. ¶ 69,709 at 76,791 (S.D.N.Y.)), and in administrative proceedings brought by the Federal Trade Commission (*e.g., Noma Electric Corp.*, 15 F.T.C. 87; *Kaumagraph Co.*, 20 F.T.C. 1).[9]

3. The decisions of this Court which have upheld, as against the charge of unconstitutional vagueness, other statutes containing terms of no greater specificity than Section 3, fully support its constitutionality.

Thus, the Court has often held that the use of such terms as "reasonable" or "unreasonable" does not, of itself, made a statute unconstitutionally vague. In *United States* v. *Ragen*, 314 U.S. 513, 523, the Court said "[t]he mere fact that a penal statute is so framed as to require a jury upon occasion to determine a question of reasonableness is not sufficient to make it too vague to afford a practical guide to permissible conduct." In that case, the Court upheld a conviction for willfully attempting to evade income taxes through making business deductions

[9] Indeed, a number of defendants in Sherman Act cases have consented to provisions enjoining them—in the very terms of Section 3—from selling at unreasonably low prices for the purpose of destroying competition. *E.g., United States* v. *Safeway Stores, Inc., supra; United States* v. *Western Newspaper Union, supra; United States* v. *Libby-Owens-Ford Glass Co.*, 1948–49 Trade Cas. ¶ 62,323 at 62,805 (N.D. Ohio); *United States* v. *A. B. Dick Co., id.*, ¶ 62,233 at 62,358 (N.D. Ohio).

in excess of the "reasonable" allowances for salaries and compensation which the Internal Revenue Code authorized. The Court ruled that the statutory standard was understandable in the light of experience and common sense to persons acting in good faith, and was actually obeyed without confusion by taxpayers generally. Particularly pertinent is *Nash* v. *United States*, 229 U.S. 373, in which the Court upheld a conviction for conspiracy in restraint of trade and to monopolize in violation of the Sherman Act. Defendant contended that the statute was indefinite, because the Rule of Reason introduced "an element of degree as to which estimates may differ", and that "criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable" (p. 377). The Court rejected his contention and Mr. Justice Holmes pointed out, in the passage quoted *supra*, pp. 18–19, that such judgments, especially in close cases, are often crucial in the criminal law.

Similarly, a conviction under a state antitrust law prohibiting contracts and arrangements "reasonably calculated" to fix prices, was upheld against a charge of vagueness. *Waters-Pierce Oil Co.* v. *Texas (No. 1)*, 212 U.S. 86, 109. The Court upheld a regulation prohibiting utilities from including more than "reasonable" charges in specified statements of account, violation of which was a criminal offense, on the ground that the term was amplified by the "context" of "good morals" and the well-known evils against which it was directed. *American Tel. & Tel. Co.* v. *United States*, 299 U.S. 232, 246. And no substantial federal question was presented by state convictions for driving at an

"unreasonable" speed. *Ratner* v. *California*, 321 U.S. 755; cf. *Miller* v. *Oregon*, 273 U.S. 657.[10]

In other cases this Court has upheld, as sufficiently definite, standards of criminality framed in general terms of no greater specificity than reasonableness. In *United States* v. *Petrillo*, 332 U.S. 1, the Court upheld a statute prohibiting coercion of employers to hire persons "in excess of the number * * * needed * * * to perform actual services" (p. 3). It recognized that there were "many factors that might be considered in determining how many employees are needed on a job," including but not limited to "an employer's statements as to the number of employees needed * * *" (p. 6). Only last Term the court sustained a criminal Sunday closing law, which exempted sales of "merchandise essential to, or customarily sold at, or incidental to, the operation of" certain recreational enterprises. *McGowan* v. *Maryland*, 366 U.S. 420. The Court pointed out that the applicability of the phrase could be easily comprehended by resort to "ordinary commercial knowledge" and the results obtainable from "a reasonable investigation" into the activities of "nearby" exempted business (p. 428). In

[10] See also *Bandini Petroleum Co.* v. *Superior Court*, 284 U.S. 8, which upheld a prohibition of "unreasonable" waste of natural gas enforceable by injunction, and found that the standard was sufficiently explained by conditions in the petroleum industry and matters of science and common knowledge. Lower courts have sustained the constitutionality of federal criminal statutes which penalized trading with one whom the defendant had "reasonable" cause to believe was an enemy of the United States, *United States* v. *Leiner*, 143 F. 2d 298 (C.A. 2) and which, as interpreted, prohibited the packaging of food under conditions allowing a "reasonable" possibility of contamination, *Berger* v. *United States*, 200 F. 2d 818 (C.A. 8).

Boyce Motor Lines, Inc. v. *United States*, 342 U.S. 337, the Court upheld a criminal conviction for violation of an Interstate Commerce Commission order which prohibited, "so far as practicable, and where feasible," the transportation of explosives and poisonous gas "through congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts, and dangerous crossings" (p. 339); the relevant factors in determining guilt were the comparative merits of other routes as "both commercially practicable and appreciably safer" (p. 342). In *Sproles* v. *Binford*, 286 U.S. 374, 380, a state statute was upheld which exempted from limits on truck length and weight any vehicles used to transport shipments "by the shortest practicable route" from point of origin to a shipping terminal, since the phrase was given meaning by "common usage and understanding." In *United States* v. *Spector*, 343 U.S. 169, 170-171, the "statutory setting" revealed the meaning, under a law penalizing wilful failure or refusal of an alien subject to a deportation order "to make timely application in good faith for travel or other documents necessary to his departure," of the words "timely" and "necessary."

Appellants rely primarily (Motion to Dismiss or Affirm, pp. 5-6) upon *United States* v. *Cohen Grocery Co.*, 255 U.S. 81. There this Court held unconstitutionally vague the provision of the Lever Anti-Profiteering Act making it "unlawful * * * wilfully to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries" (p. 86). The Court stated (pp. 89-90) that the statute "forbids no specific or definite act" and leaves open "the widest

conceivable inquiry, the scope of which no one can foresee"; and that "to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury." The Court also pointed out that the uncertainty of the statute was "vividly portrayed" by the "conflicting results" reached in a series of lower court cases construing it.

The vice of that statute (and of comparable statutes invalidated in the other cases upon which appellees rely, such as *Cline* v. *Frink Dairy Co.*, 274 U.S. 445) was not its use of the "reasonableness" standard as such, but its failure to relate this standard to any more precise rules of conduct discernible from either the legislative or historical background of the legislation or the common understanding of persons to whom it applied.[11] In other words, the statute in *Cohen* provided no meaningful standard at all as to what was prohibited. There was no way of knowing whether the Act sought to ban unreasonably high or unreasonably low prices, or discriminatory prices. There was no background or legislative policy to sup-

[11] There was the same defect in the statute invalidated in the *Cline* case. The Court struck down a state antitrust law exempting restraints of trade without which a "reasonable profit" could not be made. Under that act a businessman was required not merely to guess at the meaning of "reasonable profit"—a phrase, like that in *Cohen*, presumably prescribing maximum and not minimum prices—but also to hypothesize on the possibility of its attainment if the restraint were absent. No such necessity for divining the future is involved here; moreover, the standard in *Cline*, as in *Cohen*, did not have a clearly defined core of meaning similar to cost under Section 3.

ply standards of reasonableness. Nor did the statute impose any requirement of a particular intent that might serve to give definiteness to an otherwise vague criterion.

This Court's decision in *United States* v. *Ragen*, 314 U.S. 513, shows that the *Cohen* case affords no basis for invalidating the prohibition in Section 3 on selling at unreasonably low prices for the purpose of destroying competition. In *Ragen* (*supra*, pp. 24–25), the court upheld the statutory prohibition on making business deductions in excess of "reasonable" allowances for salaries and compensation. The court distinguished the *Cohen* case, on which the court of appeals had relied, on the ground that "[n]o such unworkable standards are involved here" (p. 523), since the "acts of bad faith" condemned by the statute "are not beyond the ready comprehension either of persons affected by the act or of juries called upon to determine violations * * *" (p. 524). It pointed out (*ibid.*) that for many years thousands of corporations have filed income tax returns without "any apparent general confusion" as to the meaning of deductions for "reasonable" allowances for salaries and compensation, and it concluded (*ibid.*): "A finding of unconstitutional uncertainty in this section of the act, as applied here, would be a negation of experience and common sense." In the present case, involving a standard that is at least as precise as that in *Ragen*, similar considerations support the validity of Section 3 "as applied here."

3. We have already shown that common understanding and past experience demonstrate the worka-

bility of the Section 3 standard, as applied to prices below cost, *supra*, pp. 20–24. But any possible constitutional doubt as to whether, as applied to sales below cost, the prohibition in Section 3 on selling at unreasonably low prices is sufficiently definite, is dispelled by the fact that such sales are criminal only if made with the purpose of destroying competition or eliminating a competitor.

In *Screws* v. *United States*, 325 U.S. 91, 101–102, Mr. Justice Douglas, in an opinion in which three other members of the Court joined, pointed out:

> The Court, indeed, has recognized that the requirement of a specific intent to do a prohibited act may avoid those consequences to the accused which may otherwise render a vague or indefinite statute invalid. The constitutional vice in such a statute is the essential injustice to the accused of placing him on trial for an offense, the nature of which the statute does not define and hence of which it gives no warning. See *United States* v. *Cohen Grocery Co.*, *supra*. But where the punishment imposed is only for an act knowingly done with the purpose of doing that which the statute prohibits, the accused cannot be said to suffer from lack of warning or knowledge that the act which he does is a violation of law. The requirement that the act must be willful or purposeful may not render certain, for all purposes, a statutory definition of the crime which is in some respects uncertain. But it does relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware. * * *

See, also, *United States* v. *Classic*, 313 U.S. 299, where a statute making it a crime for one who, acting under color of law, "willfully subjects * * * any inhabitant of any State * * * to the deprivation of any rights, privileges or immunities secured and protected by the Constitution and laws of the United States" (p. 325), was held not unduly vague because its application "is restricted by its terms to deprivations which are *willfully* inflicted" (p. 329) (emphasis added); *Williams* v. *United States*, 341 U.S. 97; *Koehler* v. *United States*, 342 U.S. 852 (Mr. Justice Jackson, dissenting from the denial of certiorari).

The reason for this principle is plain. While a person should not be subjected to criminal punishment for violating a statutory standard so vague that he cannot know whether he is committing a crime, one who acts for the purpose of accomplishing the very thing which the statute prohibits cannot claim that he was insufficiently warned that his conduct was illegal.

The Court has frequently relied upon the requirement of a specific purpose or intent to save a statute from unconstitutional vagueness. Thus, in *Gorin* v. *United States*, 312 U.S. 19, a statute prohibiting the transmittal to a foreign power of information "connected with or relating to" the national defense was sustained because of the requirement that the transmittor must have known that the information would be used to the detriment of the United States. Similarly, in *United States* v. *Ragen*, 314 U.S. 513, 524, a statute making criminal tax evasion accomplished by the deduction of more than "reasonable" business ex-

penses was held sufficiently definite because of the element of willfulness in tax evasion, since "[a] mind intent upon willful evasion is inconsistent with surprised innocence." See, also, *American Tel. & Tel. Co.* v. *United States*, 299 U.S. 232; *United States* v. *Petrillo*, 332 U.S. 1; *Boyce Motor Lines, Inc.* v. *United States*, 342 U.S. 327; *United States* v. *Spector*, 343 U.S. 169.

In the present case, "the requirement of a specific intent to do a prohibited act"—the purpose to destroy competition that accompanied the sales below cost—"relieve[s] the statute of [any] objection that it punishes without warning an offense of which the accused was unaware". Appellees are charged with intentionally selling below cost for the specific predatory purpose condemned by the statute; "certainly [they] are in no position to say that they have no adequate advance notice that they would be visited with punishment" (*Screws, supra*, 325 U.S. at 105).

II

SINCE SECTION 3 IS CONSTITUTIONAL AS APPLIED TO THE SALES CHARGED IN THIS INDICTMENT, THERE IS NO OCCASION FOR THE COURT TO CONSIDER ITS CONSTITUTIONALITY AS APPLIED TO OTHER SITUATIONS

There is no occasion for this Court to consider the constitutionality of Section 3 in any factual situation other than that involved in this case. A litigant may challenge the constitutionality of a statute only in its application to him, and in the present case Section 3 is sought to be applied only to National's sales below cost for the purpose of destroying competition.

This Court has repeatedly restricted its decision of constitutional questions to the particular facts in the

particular case before it, and has refused to determine the general validity of statutory provisions in the abstract, on the basis of their possible application to other situations. Since "[t]he delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases [that may be] imagined" (*United States* v. *Raines*, 362 U.S. 17, 22), "[i]t has long been [this Court's] considered practice not * * * to decide any constitutional question except with reference to the particular facts to which it is to be applied." *Alabama State Federation of Labor* v. *McAdory*, 325 U.S. 450, 461; *United Public Workers* v. *Mitchell*, 330 U.S. 75, 89–90. If the statute is constitutional as applied,—and, as we have shown in Point I, it plainly is—the Court will not look beyond to peripheral cases which may pose more difficult constitutional problems. *Robinson* v. *United States*, 324 U.S. 282; *United States* v. *Fruehauf*, 365 U.S. 146, 157; *Barrows* v. *Jackson*, 346 U.S. 249, 257; *United States* v. *Harriss*, 347 U.S. 612, 618. An example of the application of this principle is the *United Public Workers* case, *supra*. There this Court upheld the prohibition in the Hatch Act against taking "any active part in political management or in political campaigns," as applied to the clear case of a ward executive committeeman and worker at the polls, but expressly refused to examine any further at that time into the validity of the general standard.

The present case presents an equally compelling occasion for the application of the rule. The indictment charged that National had sold below cost for the predatory purpose condemned by the statute,

and, as we have demonstrated, the Act is constitutional as applied to such sales. Appellees' contention (Motion to Dismiss or Affirm, pp. 3–4, 9) that the statute is invalid "on its face" is merely an attempt to argue the constitutional question on the basis of hypothetical situations that are not here presented. For to say that a statute is invalid "on its face" is but another way of saying that the constitutional question should be decided in the abstract, without regard to the particular facts in the particular case. A decision on that basis, however, would be in disregard of the settled limitations which this Court customarily imposes in constitutional cases.

Cases such as *Thornhill* v. *Alabama*, 310 U.S. 88, and *United States* v. *Petrillo*, 332 U.S. 1, do not involve any departure from this principle. For in each of those cases the indictment was drawn in the words of the statute, and the Court, in determining the constitutionality of the enactment as applied to the conduct charged in the indictment, had nothing more to go on than the "face" of the legislation. In the present case, however, the indictment did not merely charge National with selling at unreasonably low prices, but specified that such prices were below cost, that the sales were subsidized by National's operations in other markets, and that they constituted a price war against National's smaller competitors conducted for the purpose of destroying competition.

In *Thornhill*, moreover, the Court was dealing with a statute "sweep[ing] within its ambit * * * activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press," 310 U.S. at

97. In the delicate area of the First Amendment, the mere existence of a broad prohibitory statute may itself have an inhibiting effect on the exercise of protected rights (pp. 97–98). The present case involves no questions of individual liberty under the First Amendment, and, unlike *Thornhill*, "[w]here regulations of the liberty of free discussion [were] concerned, there are [no] special reasons" here for broadening the scope of constitutional adjudication (p. 98). Section 3 of the Robinson-Patman Act imposes no limitations on the "exercise of individual freedoms affirmatively protected by the Constitution" (*Cramp* v. *Board*, No. 72, this Term, decided December 11, 1961, slip opinion, p. 10), and there is accordingly no occasion for this Court to consider the constitutional issue in the light of other situations to which "the statute has not been, and might never be, applied * * *." *United States* v. *Petrillo*, 332 U.S. 1, 11.

CONCLUSION

The judgment of the district court dismissing counts 2, 4, 6, 8, 10, 13, and 15 should be reversed.

Respectfully submitted.

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IN THE

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OCTOBER TERM, 196

NO.

UNITED STATES OF AMERICA, *Appellant*

v.

NATIONAL DAIRY PRODUCTS CORPORATION

and

RAYMOND J. WISE, an individual, *Appellees*

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI

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INDEX

	PAGE
Question Presented	1
Statement	2
Summary of Argument	4
I. The Issue Before the Court Is the Constitutionality of the Prohibition of "Unreasonably Low Prices," and Not of Sales Below Cost	5
A. The "Unreasonably Low Prices" Allegations of the Indictment Are Not Limited to Sales Below Cost	6
B. The Language of the Statute, Not of the Indictment, Must Be Tested	9
II. The "Unreasonably Low Prices" Clause of Section 3 of the Robinson-Patman Act is Unconstitutionally Vague	16
A. The "Unreasonably Low Prices" Clause Is Inherently Vague and Has Acquired No Clear Meaning from Legislative History or from Decisions	17
B. The Decisions of This Court Demonstrate That a Prohibition of "Unreasonably Low Prices" Is Not Sufficiently Definite to Satisfy Constitutional Requirements	22
1. A Long Line of Constitutional Decisions Has Established the Invalidity of a Reasonableness Test for Prices	22
2. Antitrust Decisions of This Court Confirm That Reasonableness Is Not an Adequate Statutory Standard for Prices	26

PAGE

3. Decisions Relied Upon by the Government Did Not Involve Situations Analogous to the "Unreasonably Low Prices" Clause 29

C. A Statute Which Proscribes No Ascertainable Act Cannot Be Made Constitutionally Definite by Requiring Intent 35

D. The Vagueness of the "Unreasonably Low Prices" Clause Is Increased by Its Incongruity with the Other Provisions of the Robinson-Patman Act and with Antitrust Policy 40

E. The Defective Vagueness and Dubious Validity of the "Unreasonably Low Prices" Clause Have Been Expressly Recognized by the Department of Justice and by Most Writers 47

III. The Constitutionality of the "Unreasonably Low Prices" Clause Cannot Be Tested in Terms of Sales Below Cost 50

A. Selling Below Cost Is Not Inherently Unreasonable 51

B. "Selling Below Cost" Is a Vague and Indefinite Standard 58

Conclusion 72

Appendix: The Robinson-Patman Act

Section 1 ..... A-1
Section 3 ..... A-4

CITATIONS

CASES	PAGE
Alabama State Federation of Labor v. McAdory, 325 U.S. 450 (1945)	15
American Seeding Machine Company v. Kentucky, 236 U.S. 660 (1915)	25
American Telephone and Telegraph Co. v. United States, 299 U.S. 232 (1936)	32
American Tobacco Co. v. United States, 328 U.S. 781 (1946)	43, 53
Automatic Canteen Co. v. Federal Trade Commission, 346 U.S. 61 (1953)	65
Balian Ice Cream Co. v. Arden Farms Co., 91 F. Supp. 796 (S.D. Cal. 1950)	69
Bandini Petroleum Co. v. Superior Court, 284 U.S. 8 (1931)	12, 30
Barrows v. Jackson, 346 U.S. 249 (1953)	15
Ben Hur Coal Co. v. Wells, 242 F.2d 331 (10th Cir. 1957)	54, 70, 71
Blackwell Journal Pub. Co., 23 F.T.C. 413 (1936)	64
Boyce Motor Lines, Inc. v. United States, 342 U.S. 337 (1952)	30, 38, 46
Champlin Refining Co. v. Corporation Commission of Oklahoma, 286 U.S. 210 (1932)	10, 26, 31
Cline v. Frink Dairy Co., 274 U.S. 445 (1927)	16, 24, 25, 30, 31, 32, 33, 38
Collins v. Kentucky, 234 U.S. 634 (1914)	25
Connally v. General Construction Co., 269 U.S. 385 (1926)	10, 11, 25, 26

PAGE

Cramp v. Board of Public Instruction of Orange County, Florida, 82 S. Ct. 275 (decided December 11, 1961) 10, 13, 38, 39

Eastern Railroad Presidents Conference v. Noerr Motor Freight, 365 U.S. 127 (1961) 45

Ex Parte Bain, 121 U.S. 1 (1887) 9

F & A Ice Cream Co. v. Arden Farms Co., 98 F. Supp. 180 (N.D. Cal. 1951) 68, 69

Federal Trade Commission v. Anheuser-Busch, 363 U.S. 536 (1960) 42, 43

Federal Trade Commission v. Morton Salt Co., 334 U.S. 37 (1948) 43

Gorin v. United States, 312 U.S. 19 (1941) 37

International Harvester Co. v. Kentucky, 234 U.S. 216 (1914) 25, 27

Kennington v. Palmer, 255 U.S. 100 (1921) 23

Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211 (1951) 28

Kinnane v. Detroit Creamery Company, 255 U.S. 102 (1921) 23

Koehler v. United States, 342 U.S. 852 (1951) 36, 39

Lanzetta v. New Jersey, 306 U.S. 451 (1939) 10

Lock Joint Pipe Co., 27 F.T.C. 709 (1938) 64

Malone v. Kentucky, 234 U.S. 639 (1914) 25

McGowan v. Maryland, 366 U.S. 420 (1961) 30

Miller v. Oregon, 273 U.S. 657 (1926) 30

PAGE

Moore v. Mead's Fine Bread Co., 348 U.S. 115 (1954) 42, 43

E. B. Muller & Co. v. Federal Trade Commission, 142 F.2d 511 (6th Cir. 1944) 61

Musser v. Utah, 333 U.S. 95 (1948) 26

Nash v. United States, 229 U.S. 373 (1913) 27, 29, 30, 31, 32

Nashville Milk Co. v. Carnation Co., 355 U.S. 373 (1958) 21, 24, 25, 35, 47, 68

Oglesby Grocery Company v. United States, 255 U.S. 108 (1921) 23

Porto Rican American Tobacco Co. v. American Tobacco Co., 30 F.2d 234 (2d Cir. 1929) 42, 51

Ratner v. California, 321 U.S. 755 (1944) 30

Rescue Army v. Municipal Court of Los Angeles, 331 U.S. 549 (1947) 12

Robinson v. United States, 324 U.S. 282 (1945) 15

Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951) 52

Screws v. United States, 325 U.S. 91 (1945) 36, 37, 38, 39

A. B. Small Company v. American Sugar Refining Company, 267 U.S. 233 (1925) 23, 24

Smith v. Cahoon, 283 U.S. 553 (1931) 26

Sproles v. Binford, 286 U.S. 374 (1932) 30, 38

Standard Oil Co. v. Federal Trade Commission, 340 U.S. 231 (1951) 43, 45

Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911) 26

State v. Fleming Co., 184 Kan. 674, 339 P.2d 12 (1959) 62, 63

PAGE

Tedrow v. A. T. Lewis and Son Dry Goods Company, 255 U.S. 98 (1921) 23

Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907) 28

Thornhill v. Alabama, 310 U.S. 88 (1940) 11

United Public Workers v. Mitchell, 330 U.S. 75 (1947) 16

United States v. Alford, 274 U.S. 264 (1927) 12

United States v. Addyston Pipe & Steel Co., 85 Fed. 271 (6th Cir. 1898) 31

United States v. American Tobacco Co., 221 U.S. 106 (1911) 43, 53

United States v. Borden Co., 308 U.S. 188 (1939) 9

United States v. Classic, 313 U.S. 299 (1941) 13, 36

United States v. Cardiff, 344 U.S. 174 (1952) 40

United States v. L. Cohen Grocery Company, 255 U.S. 81 (1921) 12, 22, 23, 25, 27, 28, 30, 31, 32, 34, 35, 38

United States v. Corn Products Refining Co., 234 Fed. 964 (S.D.N.Y. 1916) 43, 54

United States v. Evans, 333 U.S. 483 (1948) 12

United States v. Fruehauf, 365 U.S. 146 (1961) 15

United States v. Fairmont Foods Co. (unreported), Trade Reg. Rep. U.S. Antitrust Cases Summaries, 1957-61, Case No. 1422, 66,368 21

United States v. Five Gambling Devices, 346 U.S. 441 (1953) 12

United States v. Harriss, 347 U.S. 612 (1954) 12, 13, 14, 32

PAGE

United States v. Jones, 345 U.S. 377 (1953) 9

United States v. Kahriger, 345 U.S. 22 (1953) 12

United States v. McKesson & Robbins, 351 U.S. 305 (1956) 52

United States v. Parke Davis & Co., 362 U.S. 29 (1960) 52

United States v. Pennsylvania Railroad Company, 242 U.S. 208 (1916) 26

United States v. Petrillo, 332 U.S. 1 (1947) 11, 12, 30, 33, 38

United States v Radio Corp. of America, 358 U.S. 334 (1959) 29

United States v. Ragen, 314 U.S. 513 (1942) 14, 29, 31, 32, 34, 35

United States v. Raines, 362 U.S. 17 (1960) 15

United States v. Safeway Stores, Inc., 20 F.R.D. 451 (N.D. Tex. 1957) 21

United States v. Shreveport Grain and Elevator Company, 287 U.S. 77 (1932) 12, 26, 40

United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) 18, 27, 28, 45

United States v. Spector, 343 U.S. 169 (1952) ... 12, 13, 30

United States v. Trenton Potteries Co., 273 U.S. 392 (1927) 27, 28, 45

United States v. Winslow, 227 U.S. 202 (1913) 9

United States v. Wurzbach, 280 U.S. 396 (1930) . 12, 13, 46

Waters-Pierce Oil Company v. Texas, 212 U.S. 86 (1909) 31

PAGE

C. A. Weed and Company v. Lockwood, 255 U.S. 104 (1921) 23

Weeds v. United States, 255 U.S. 109 (1921) 23, 38

G. S. Willard Company v. Palmer, 255 U.S. 106 (1921) 23

Williams v. United States, 341 U.S. 97 (1951) 36

TEXTS

ADVISORY COMMITTEE ON COST JUSTIFICATION, REPORT TO THE FEDERAL TRADE COMMISSION (1956); CCH, COST JUSTIFICATION REPORT, TEXT OF REPORT TO THE FEDERAL TRADE COMMISSION BY THE ADVISORY COMMITTEE ON COST JUSTIFICATION (no date) 65, 66, 67

B.N.A., ANTITRUST & TRADE REG. REP., p. A-2 (Aug. 22, 1961) 48

Clark, *Statutory Restrictions on Selling Below Cost*, 11 VAND. L. REV. 105, 123 (1957) 69

Comment, *Federal Remedies Available Against One Who Sells at Unreasonably Low Prices*, 9 INTRA. L. REV. (N.Y.U.) 239, 242-44 (1954) 49

Comment, *The Meaning and Judicial Interpretation of Section 3 of the Robinson-Patman Act*, 49 NW. U.L. REV. 273 (1954) 49

Comment, 55 MICH. L. REV. 845, 853 (1957) 25, 49

EDWARDS, PRICE DISCRIMINATION (The Brookings Institution, 1959) 66, 67, 68

Hamilton, *Cost as a Standard for Price*, 4 LAW & CONTEMP. PROB. 321 (1937) 68

HAVIGHURST, THE NATURE OF PRIVATE CONTRACT (Northwestern Univ. Press, 1961) 17

PAGE

Lovell, *Sale Below Cost Prohibitions: Private Price Fixing under State Law*, 57 YALE L. J. 391 (1948) ... 69

Note, 100 U. of PENN. L. REV. 1058 (1952) 49

Note, 108 U. of PENN. L. REV. 116, 122 (1959) 49

PALAMOUNTAIN, THE POLITICS OF DISTRIBUTION (Harvard Univ. Press, 1955) 19, 20, 41, 49

REPORT CONCERNING THE WHOLESALE TRADE IN CIGARETTES AND CONFECTIONERY IN THE EDMONTON DISTRICT (1958) 70

REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS (1955) ... 49

STATISTICAL ABSTRACT OF THE UNITED STATES (1961) 53

WIXON, ACCOUNTANT'S HANDBOOK (Ronald, 4th Ed., 1961) 68

STATUTES

Clayton Act, as amended by the Robinson-Patman Act, Section 2 (Section 1 of the Robinson-Patman Act 49 Stat. 1526-1528, 15 U.S.C. § 13 ..... 1, 41, 43, 44, 55, A—1, 2, 3, 4

Criminal Appeals Act, 34 Stat. 1246, 18 U.S.C. § 3731 ..... 5, 14

Emergency Price Control Act, 56 Stat. 23, 50 U.S.C. § 901-946 ..... 29, 66

Robinson-Patman Act, Section 3, 49 Stat. 1528, 15 U.S.C. § 13a ..... *passim*, A-4, 5

Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1 *et seq.* 8, 26, 29, 31, 45

MISCELLANEOUS PAGE

Hearings Before a Subcommittee of the House Committee on Interstate and Foreign Commerce on H.R. 10235, 86th Cong. 2d Sess. (1960) 47, 60, 61, 64

Hearings Before a Subcommittee of the Senate Judiciary Committee on S. 4171, 74th Cong., 2d Sess. (1936) 19, 20, 56, 57

80 CONG. REC.

8227 48

8228 48

9419 ..... 44, 48

2 TRADE REG. REP., par. 6571, *et seq.* 62

IN THE

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OCTOBER TERM, 1961

NO. 173

UNITED STATES OF AMERICA, *Appellant*

v.

NATIONAL DAIRY PRODUCTS CORPORATION
and
RAYMOND J. WISE, an individual, *Appellees*

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI

BRIEF FOR APPELLEES

QUESTION PRESENTED

The question presented by this appeal is whether the "unreasonably low prices" clause of Section 3 of the Robinson-Patman Act is unconstitutionally vague. The clause in issue states:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, . . . to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor." (49 Stat. 1526, 15 U.S.C. sec. 13a)

The texts of Sections 1 (section 2 of the Clayton Act), and 3 of the Robinson-Patman Act are reprinted in the Appendix to this brief.

STATEMENT

Seven counts of the fifteen-count indictment charge that the corporate defendant, National Dairy Products Corporation, sold milk "at unreasonably low prices for the purpose of destroying competition . . . in violation of Section 3." (Counts Two, Four, Six, Eight, Ten, Thirteen, and Fifteen, R 9, 12, 15, 18-19, 22, 28 and 32)[1] One of these counts (Thirteen) also makes the same charge against the individual defendant, Raymond J. Wise. Each count also contains an additional paragraph alleging that sales were made to distributors "at prices below National's cost."

The defendants moved to dismiss these counts on the ground that they rest upon a statutory provision which is so vague as to be contrary to the due process requirements of the Fifth Amendment and to the requirement of the Sixth Amendment that defendants in criminal cases be adequately informed of the accusations against them. (R 52, 68, 71) In an oral opinion the court held that the Robinson-Patman Act counts were based upon a statutory provision which is unconstitutionally "vague and indefinite." (R 121-22) An order of dismissal was entered, finding the clause of Section 3 "so vague, indefinite and uncertain as to violate the Fifth and Sixth Amendments to the Constitution of the United States." (R 122-23)

The decision was not an off-hand ruling (R 87, 90, 121), as the Government seems to imply. (G.B.5) Briefs were

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1. In this brief, the abbreviation, "R", refers to the printed Transcript of Record herein, and the abbreviation, "G.B.", refers to the Government brief on appeal.

filed by both the defendants and the Government, and there was extensive oral argument. (R 86-121).

During the oral argument, the trial judge asked whether the charges of the indictment were limited to charges of sales below cost, and was told by Government counsel that they were not. (R 114-16). In view of the language of the indictment and of the interpretation placed upon it by Government counsel, the court, in dismissing the indictment, construed the charges as being as broad as the language of the statute.

In its Notice of Appeal the Government broadly described the indictment as charging "sales at 'unreasonably low prices'" and stated that the question presented by the appeal is whether prohibition "of unreasonably low prices for the purpose of destroying competition or eliminating a competitor" is unconstitutionally vague. (R 124-25). In its brief, however, the Government has virtually abandoned any attempt to support the language of the statute. Instead it has sought to limit the question to whether the statutory clause "as applied to sales made below cost with such purpose" is unconstitutionally vague and indefinite. (G.B. 3). It urges that the Court may not consider whether the language of the statute itself deprives appellees of constitutional rights but must instead consider whether its application to the facts alleged in the indictment, which the Government here for the first time construes as limited to "sales below cost," would be constitutional. (G.B. 32).

SUMMARY OF ARGUMENT

I. The issue before the Court is whether the language of the "unreasonably low prices" clause of Section 3 of the Robinson-Patman Act, on which the indictment is based, is so vague as to be unconstitutional. (A.) The indictment in this case is drawn in the statutory language and brings the full scope of that language into issue. It is not limited to charging sales below cost. (B.) Irrespective of the language of the indictment, under the decisions of this Court the constitutionality of the statute can and should be tested on the basis of the language of the statute.

II. Judged by the principles evolved by the Court for testing the constitutionality of criminal statutes in vagueness cases, the "unreasonably low prices" clause of Section 3 is fatally vague, indefinite and uncertain. (A.) The statute is inherently vague. (B.) Decisions of this Court demonstrate that the "unreasonably low prices" clause is unconstitutionally vague. (C.) The intent requirement of the provision in issue does not reduce the uncertainty of the "unreasonably low prices" clause and does not render the provision constitutional. (D.) The inherent vagueness of the clause is greatly increased by its inconsistency with the general scheme of the Robinson-Patman Act, and by its incongruity with the antitrust policy of price competition. (E.) For these reasons, the "unreasonably low prices" clause has long been recognized to be of dubious constitutional validity by the Department of Justice and by most writers.

III. There is no basis for construing the prohibition against sales at "unreasonably low prices for the purpose of destroying competition" as equivalent to "sales below

cost with predatory intent." No process of construction warrants the approach offered by the Government, and this interpretation is itself vague and indefinite. (A.) Contrary to the Government's argument, selling below cost is not in itself unreasonable conduct. Only rarely is it contrary to business and community standards. Accordingly, selling below cost, even if done with intent to eliminate competition, would not be legally equivalent to the statutory prohibition. (B.) Moreover, the Government's attempted construction of the statute to mean "selling below cost" would not provide a sufficiently clear standard. The concept of "cost", without benefit of statutory definition or meaning derived from legislative history, is itself vague and indefinite.

I. THE ISSUE BEFORE THE COURT IS THE CONSTITUTIONALITY OF THE PROHIBITION OF "UNREASONABLY LOW PRICES," AND NOT OF SALES BELOW COST.

The district court held that the statute, on which the indictment before it was based, is so vague and indefinite as to violate the due process and notice requirements of the Fifth and Sixth Amendments and is therefore unconstitutional on its face. On the basis of that holding the Government has invoked the jurisdiction of this Court under the Criminal Appeals Act to review directly a district court judgment "dismissing . . . any indictment . . . where such . . . judgment is based *upon the invalidity . . . of the statute* upon which the indictment is founded. . . ." (34 Stat. 1246, 18 U.S.C. § 3731; emphasis added)

Despite the fact that in its brief and argument below the Government defended the "unreasonably low prices" language of the statute itself and recognized the scope of the charges of the indictment as being co-extensive with that language, the Government now offers virtually no support for that language, but seeks instead to defend a purely hypothetical prohibition against selling below cost. While it suggests in a footnote that it might be possible in some circumstances to show that a price is "unreasonably low" even though it is higher than the seller's costs (G.B. 20, n. 7), it makes no argument on behalf of this proposition.

The Government expressly admits the serious ambiguities inhering in the language used by Congress in the statute. (G.B. 12) It contends, however, that the Court should concern itself only with the prosecution's choice of terminology in the indictment and should not be drawn into a consideration of the words of the statute. In view of the scope of the indictment itself, however, the vagueness issue presented on this appeal cannot be disposed of in the unique manner attempted by the Government. Moreover, irrespective of the language of the indictment, under the decisions of this Court, the constitutional question concerns the language of the statute, not the indictment.

A. The "Unreasonably Low Prices" Allegations of the Indictment Are Not Limited to Sales Below Cost.

The allegations of the indictment are as broad in scope as the statutory provision and plainly are not limited to charging below-cost sales.

Each count of the indictment relating to Section 3 contains two paragraphs under the heading, "Offense Charged Robinson-Patman Act." Counts Two, R 9; Four, R 12; Six, R 15; Eight, R 18; Ten, R 22; Twelve, R 25; and Fifteen, R 32. The first such paragraph alleges that defendant "sold milk to its distributor . . . at unreasonably low prices for the purpose of destroying competition . . . in violation of Section 3" of the Robinson-Patman Act. The second paragraph then adds that "pursuant to and in effectuation of the offense charged" in the preceding paragraph the defendant utilized advantages of operating in many geographical localities to finance a price war against small dairies competing with it and its distributor "by intentionally selling milk to its distributor . . . at prices below National's cost."

As the second paragraph states, the "offense charged" is that alleged in the first paragraph, where the allegations are not in terms of sales below cost, but are in the language of the statute, "unreasonably low prices." The Government admits that the words, "unreasonably low prices," when appearing in the statute, may mean both sales above and sales below cost. G.B. 20, n. There is no basis for reading this language any differently when it appears in the charging paragraph of the indictment.

If the indictment were intended, when it was drawn, to be limited as the Government now argues, it would have alleged simply in one paragraph that defendant had sold milk at prices below cost in violation of the "unreasonably low prices" prohibition. This is the method followed in the Sherman Act counts of the indictment where the type of

restraint charged is alleged as part of the overall allegation of violation, *viz.*, "a combination and conspiracy to fix in-store milk prices and to eliminate competition in the sale of milk . . . in unreasonable restraint of trade." (*e.g.*, Count One, R 7)

The Sherman Act counts provide further internal evidence that the Robinson-Patman Act counts are not limited to sales below cost. Several of the Sherman Act counts allege that defendant agreed to "sell milk in paper carton containers . . . below its cost *or at special discount prices.*" (*e.g.*, R 10-11; emphasis supplied.) Since the Government states that each Robinson-Patman count parallels a Sherman Act count (G.B. 5, n. 1), these sales are evidently among those charged to have been at unreasonably low prices. But sales "at special discount prices" are obviously not necessarily sales at prices below cost.

Moreover, representations made by Government counsel to the trial court established that the indictment has a broader scope than below-cost sales. In the course of the oral argument counsel undertook to summarize how the Government would attempt to show the unreasonableness of defendant's prices. (R 114) The court then asked whether the case against defendants was limited to sales below cost. Government counsel expressly stated that it was not so limited:

> "The Court: Well, do you understand that it is a requirement that to be an unreasonably low price that it must be below cost?
>
> "Mr. Eisen: No, it does not have to be below cost." (R 115)

Neither the Government brief below, nor the written statements on behalf of defendants (R 33, 71), interpreted

the indictment as limited to sales below cost. The trial court expressly relied on the briefs in its oral opinion holding the "unreasonably low prices" clause unconstitutional. (R 121-22) The trial court's oral opinion and its order of dismissal both construed the indictment as a general allegation of unreasonably low prices. (R. 124-23) The Government in its Notice of Appeal described the indictment as "charging defendants with charging unreasonably low prices . . ." and did not even mention sales below cost. (R 124-25) The Notice stated without any qualification that the question presented by this appeal is whether the "unreasonably low prices" clause of the Act is constitutional. (R 124-25).

The Government cannot now attempt a different construction of the indictment. This court has often held that the trial court's construction of the indictment is controlling in appeals under the Criminal Appeals Act. *United States v. Winslow*, 227 U.S. 202, 216-217 (1913); *United States v. Borden Co.*, 308 U.S. 188, 193 (1939); *United States v. Jones*, 345 U.S. 377, 378 (1953). It is, of course, also beyond dispute that the Government cannot, on its own motion, amend the scope of the indictment as it was presented by the grand jury. *Ex Parte Bain*, 121 U.S. 1, 6, 9 (1887).

B. The Language of the Statute, Not of the Indictment, Must Be Tested.

Even if the indictment were limited to allegations of sales below cost, the issue would nevertheless be the validity of the "unreasonably low prices" clause. The Government cannot defeat vindication of the constitutional rights of due

process and notice by the expedient of submitting its own indictment, rather than the statute, to the test. It is well-established by the decisions of this Court that the validity of a statute challenged as unconstitutionally vague "must be tested on the basis of the terms employed" in the statute. *Champlin Refining Co. v. Corporation Commission of Oklahoma,* 286 U.S. 210, 242 (1932). In the often-quoted language of *Lanzetta v. New Jersey,* 306 U.S. 451, 453 (1939) the test is of the statute "on its face" because "it is the statute, *not the accusation under it,* that prescribes the rule to govern conduct and warns against transgression . . . ." (Emphasis added.)

This settled procedure is required by the substantive nature of the applicable constitutional doctrine. Criminal statutes must describe what they prohibit with sufficient clarity to give notice and fair warning, so that those affected will be able to comply with the law. The doctrine was most recently reaffirmed by the Court in *Cramp v. Board of Public Instruction of Orange County, Florida,* 82 S. Ct. 275 (decided December 11, 1961), where the Court again endorsed the classic statement contained in *Connally v. General Construction Co.,* 269 U.S. 385, 391 (1926):

> "That the terms of the penal statute . . . must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. The statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily

> guess at its meaning and differ as to its application violates the first essential of due process of law."

Obviously, only "the terms of the penal statute," as they stand or as authoritatively construed, can reveal whether the statute is "sufficiently explicit" to meet these minimal constitutional requirements.

On this issue the present case is indistinguishable from *United States v. Petrillo*, 332 U.S. 1 (1947). The information in *Petrillo* was drawn in much the same form as the indictment here, *i.e.*, it was drawn in the statutory language "up to the place where it specifically charges the particular means used. . . ." (332 U.S. at 5)[2] There, as here, a motion to dismiss was granted by the district court because the statute was unconstitutionally vague on its face. Under these circumstances, this Court held that the question "squarely" raised by the motion was "whether the section invoked in the indictment is void *in toto*, barring all further actions under it, in this, and every other case." (*Id.* at 5-6)

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2. The Government attempts to distinguish the relevant part of the *Petrillo* opinion, as well as the holding in *Thornhill v. Alabama*, 310 U.S. 88 (1940), on the basis that in those cases the Court "had nothing more to go on" than the language of the statute. (G.B. 34) But this reading of those cases is erroneous, and both cases stand squarely against the Government's attempt in this case to divert the issue from the statutory language. The *Petrillo* indictment alleged "the particular means used" (332 U.S. at 5), and in *Thornhill* there was no doubt at all as . now the statute was to be applied since the case came to this Court only after conviction. Nevertheless, this Court tested the statute "on its face." (310 U.S. at 97)

The Court stated further that "whether the contested section is written so vaguely and indefinitely that one whose conduct is affected could only guess what it meant" was a question then "ripe" for decision. (332 U.S. at 6)[3]

Indeed, so far as we have been able to determine, in every case brought, as is the instant case, on direct appeal under the Criminal Appeals Act after a district court had held an act of Congress unconstitutional for vagueness, this Court has looked to the face of the statute to determine the constitutional issue: *United States v. Harriss,* 347 U.S. 612 (1954); *United States v. Five Gambling Devices,* 346 U.S. 441, 453-454, 456-459 (1953); *United States v. Kahriger,* 345 U.S. 22, 33-34 (1953); *United States v. Spector,* 343 U.S. 169 (1952); *United States v. Petrillo,* 332 U.S. 1 (1947); *United States v. Shreveport Grain and Elevator Company,* 287 U.S. 77 (1932); *United States v. Wurzbach,* 280 U.S. 396 (1930); *United States v. Alford,* 274 U.S. 264 (1927); *United States v. L. Cohen Grocery Company,* 255 U.S. 81 (1921); cf. *United States v. Evans,* 333

3. *Petrillo* followed closely in time the leading decision in *Rescue Army v. Municipal Court of Los Angeles,* 331 U.S. 549 (1947) detailing this Court's "policy of strict necessity in disposing of constitutional issues." (331 U.S. at 568) With respect to the application of that policy in vagueness cases, *Rescue Army* recognized as "well settled" the ruling of *Bandini Petroleum Co. v. Superior Court,* 284 U.S. 8 (1931). In that case a California statute was challenged as unconstitutionally vague, and on the basis of the statutory language alone "this Court . . . determined the constitutional issues presented on the face of the statute . . ." (331 U.S. at 566) *Petrillo* squarely held that the rule acknowledged by *dictum* in *Rescue Army* remained the settled law.

U.S. 483, 495 (1948); *United States v. Classic*, 313 U.S. 299, 309 (1941).[4] The application of the same rule with respect to a state statute is most recently illustrated by the Court's unanimous decision in *Cramp v. Board of Public Instruction of Orange County, Florida*, 82 S. Ct. 275 (1961).

In the *Spector* case, the Court explicitly rejected the argument made by the Government here that the issue was whether the statute was constitutional as applied in the case before the Court, stating:

> "While a statute, plain and unambiguous on its face, may be given an application that violates due process of law, we are not concerned with that problem in the present case. The question here is whether the statute *on its face* meets the constitutional test of certainty and definiteness." (343 U.S. at 171, emphasis added)

And in *United States v. Harriss*, 347 U.S. 612 (1954), another case involving the quashing of an indictment brought under a federal statute and a case on which the Government surprisingly seems to rely (G.B. 33), the Court, though divided on the merits, was unanimous in rejecting the Government's claim that the question was merely whether the statute's application to the particular situation described in the indictment was unconstitutional.

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4. In *United States v. Wurzbach*, 280 U.S. 396 (1930) the details of the indictment were given substantial discussion, but it is clear that this consideration came only after the Court had determined that the statute challenged was valid on its face, "perfectly intelligible." (*Id.* at 398)

Mr. Chief Justice Warren, speaking for the Court, made it clear that "we judge the statute on its face." (347 U.S. 612, 617) Mr. Justice Douglas, speaking for a dissenting minority, agreed that "the question . . . is not what the information charges nor what the proof might be. It is whether the statute itself is sufficiently narrow and precise as to give fair warning." (*Id.* at 629) Another dissenting opinion by Mr. Justice Jackson deemed the statute on its face "mischievously vague." (*Id.* at 633)

The theory offered by the Government here is not only at variance with these decided cases but constitutes a denial of the rationale of the vagueness doctrine itself and of the jurisdiction of this Court under the Criminal Appeals Act to review judgments based upon the invalidity of a statute. The Government is really saying that the prosecutor can always cure a vague statute by making the indictment definite. But the Constitution requires fair warning through the statute itself so that illegal conduct may be avoided. The indictment, which issues only after the accused has done what the indictment claims to have been prohibited, cannot give that notice. Moreover, the Government's theory would turn every challenge to a statute for vagueness into a dispute over the terms of the indictment and deprive this Court of the very jurisdiction that the Government has invoked in this case.

No case cited by the Government (G.B. 29, 33, 35) holds that the prosecution can avoid a test of statutory language on vagueness grounds by offering the language of the indictment instead. In *United States v. Ragen*, 314 U.S. 513 (1942) the only challenge made was as to the

application of the statute in the particular case; the Court pointed out that the statute "standing alone, is not vague . . . ." (314 U.S. at 523). *Robinson v. United States*, 324 U.S. 282 (1945) involved primarily a problem of statutory construction. The majority clearly thought the constitutional argument was frivolous since the language at issue was everyday English delineating a general class of proscribed activity, into which the deeds of the defendant, who had already been tried, convicted and sentenced in the court below, indisputably fell. In *United States v. Fruehauf*, 365 U.S. 146, 157 (1961), as the Court's opinion shows, there was no vagueness issue and no attack was made on the statute itself. Again, *United States v. Raines*, 362 U.S. 17 (1960) involved no problem of constitutional indefiniteness, but the Court recognized that a challenge to a statute for vagueness presents a situation in which the statute must be judged on its face. (*Id.* at 22, 24).

The remaining cases cited by the Government (G.B. 33) involved situations in which it had not been shown that those who brought the actions, which were for injunction or declaratory judgment, would be injured by enforcement of the challenged statutes. Accordingly, they turned on the question of the existence of a case or controversy. The natural reluctance of this Court to entertain actions brought to vindicate the rights of third parties (*Barrows v. Jackson*, 346 U.S. 249, 255 (1953)) or to rule on the constitutionality of a state statute before the state courts had been given an opportunity to construe it (*Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 459, 462, 470-471 (1945)) or to comment on the "political expediency" of

an Act of Congress (*United Public Workers v. Mitchell*, 330 U.S. 75, 89 (1947)) has little to do with the case at bar.

Here appellees do not face what the Court called in the *United Public Workers* case a "hypothetical threat." (*Id.* at 90) Both have been indicted in the words of a Federal statute. Both risk criminal conviction. The Court's comment in *Cline v. Frink Dairy Co.*, 274 U.S. 445, 457 (1927) is particularly apt: "the whole statute [is] without a fixed standard of guilt in an adjudication affecting the liberty of the one accused."

Under these circumstances it is the settled rule of this Court that the issue is whether the statutory provision under which respondents have been indicted is so vague and indefinite on its face as to deprive them of their constitutionally guaranteed rights of notice and due process. The Government should not be permitted to thwart those basic civil rights by diverting the Court's attention to the Government's own choice of words in the indictment, when the relevant issue is the constitutionality of the statute on which the indictment is based.

II. THE "UNREASONABLY LOW PRICES" CLAUSE OF SECTION 3 OF THE ROBINSON-PATMAN ACT IS UNCONSTITUTIONALLY VAGUE.

The "unreasonably low prices" clause of Section 3 of the Robinson-Patman Act in issue states that it is unlawful "to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor." (49 Stat. 1526, 15 U.S.C. sec. 13a) The statute

contains no definitions of these indefinite terms. Yet it makes violation a crime and provides for penalties of up to $5,000 fine and a year's imprisonment. (See Appendix to this brief.) This prohibition is unconstitutionally vague, as the district court held.

A. The "Unreasonably Low Prices" Clause Is Inherently Vague and Has Acquired No Clear Meaning from Legislative History or from Decisions.

The unreasonably low prices clause is intrinsically vague. It prohibits no specific act, and it provides no intelligible standard of conduct by which businessmen can guide their sales in competition with others and be assured of staying within the law. It is equally vague as a standard for the conduct of trials. Without any definitions, it subjects corporate violators to the threat of criminal conviction and fines; and it subjects individual entrepreneurs and partners in small and large businesses alike to the threat of jail sentences as the cost of failure to comprehend and follow its inscrutable standards.

The phrase "unreasonably low prices" is the touchstone for applicability of the prohibition. This phrase requires a judgment by businessmen, and by courts and juries, as to whether a given price is illegally low as a matter of dollars and cents. But how can one know, or by what process can one decide, whether the amount of a price is "unreasonably" low? Ever since economic society abandoned the Middle Ages concept of a "just" price,[5] morality

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5. See Havighurst, The Nature of Private Contract 101 (Northwestern Univ. Press, 1961).

has not provided a legal standard for the measurement of prices. Our courts do not judge in legal actions whether prices are too high or too low—an inquiry which is occasionally delegated for regulated industries to administrative agencies, but which generally is left to the free decisions of entrepreneurs under the limitations imposed by competition in the marketplace.

Indeed, it is the complete freedom of prices to move according to the pressures of economic forces that makes it possible for the competitive market price system to function, in the language of Mr. Justice Douglas, as the "central nervous system of the economy." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224, n. 59 (1940). Accordingly, as is shown in succeeding sections of this brief, the attempt to induce the courts to administer and adjudicate prices by reasonableness tests has been repeatedly and consistently rejected.

It will also be shown that the phrase "unreasonably low prices" is not made constitutionally definite by the additional requirement that the prices be charged with the intent to destroy competition or eliminate a competitor. There is a temptation, manifested in the Government brief, to seek to solve the inherent indefiniteness of the unreasonably low prices clause by using the intent requirement as a test of unreasonableness. To do this, however, would read "unreasonably low" out of the Act, and tend to make any price unreasonable if charged by one entertaining the requisite purpose. The Act would then endanger all who, while making sales, entertain the desire to defeat

their competitors. Such an invalidation of price competition cannot have been the intent of Congress.

The history of the clause does not illuminate its meaning. As the Government states (G.B. 15, n. 4), the language of Section 3, enacted in 1936, was copied from a statute passed by the Canadian Parliament in 1935, only a year earlier. Consequently, unlike other provisions of our antitrust legislation, the language of the "unreasonably low prices" clause was not drawn from the common law, nor was it based upon any prior antitrust experience of the United States. The Canadian act had received no court interpretation in Canada at the time our act was passed, and insofar as we and the Government have been able to determine, there is to this day no reported Canadian court case construing its meaning. (G.B. 15, n. 4)

Moreover, as the Government brief shows, little attention was paid to the clause in the Congressional discussions of 1935 and 1936. The section, which was originally known as the "Borah-Van Nuys Bill," was introduced in the Senate as a substitute for the Robinson-Patman price discrimination bill.[6] Inadvertently interjected in this way into a controversy which was almost exclusively concerned with how to deal with problems of price discrimination, the Canadian-originated, "unreasonably low prices" clause received little discussion. Its sponsors gave it no exposition, and it was not

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[6] S. 4171, 74th Cong., 2d Sess. See PALAMOUNTAIN, THE POLITICS OF DISTRIBUTION 221 (Harv. Univ. Press, 1955, Harvard Political Studies, published under the direction of the Department of Government in Harvard University).

explained in any committee report. The House held no hearings on it, and the Senate hearings on the Borah-Van Nuys bill centered largely on the price discrimination provisions both of that bill and of the Robinson-Patman bill with more attention being paid to the latter.[7] The hearings contain only a very few scattered and uninformative references to the "unreasonably low prices" clause. (G.B. 16)

When the various forces in the House and Senate were unable to compose their differences, Congress ended a stalemate by enacting both bills.[8] It is well known that passage of both bills was not the original desire of the sponsors of either and was an unfortunate and confusing occurrence which has always made it difficult to discern the meaning of any part of Section 3 by reference to legislative history.[9] Certainly that history sheds no light on the "unreasonably low prices" clause and reveals no clear purpose for its passage. As shown later in this brief, the Government's attempt to show that the clause was specifically aimed at predatory below-cost sales is decidedly without support.

That the constitutionality of the "unreasonably low prices" clause has yet to be tested by this Court is the result of almost complete nonuse of this clause by the Department of Justice. No decisions have given meaning to its vague language. Until 1958, over 20 years after the passage of the Act, the Government obtained no indictments

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7. *Hearings Before a Subcommittee of the Senate Committee on the Judiciary on* S. 4171, *Price Discrimination*, 74th Cong. 2nd Sess. (1936); see PALAMOUNTAIN, *op. cit. supra* note 6.

8. PALAMOUNTAIN, *op. cit. supra* note 6, 225, 228.

9. *Ibid.*

under it. We know of only two cases in which such charges have ever been made—the present case and *United States v. Fairmont Foods Co.* (unreported), which involved charges under the second and third clauses of Section 3 as well as under the Sherman Act and was terminated without a trial.[10]

Very few private actions were brought against competitors for allegedly charging prices which were too low, and in *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373 (1958) the Court held that private litigation under Section 3 is not authorized. The Court based its conclusion in part upon the belief that Congress did not intend to place defendants at the risk of suit by their competitors under the "unreasonably low prices" clause, which the Court called "this vague provision." (Id. at 378)

The Government itself, claiming that it need not defend the words of this dubious clause, offers no exposition of its meaning. Instead it concedes its ambiguity and susceptibility to inconsistent interpretations. It admits the "conceptual problems" of the language, and it demonstrates that the clause may restrain lawful activity by showing how it may be given different meanings. (G.B. 12) With this

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10. The defendant pleaded guilty in the *Fairmont Foods* case, and sentence was imposed only under the Sherman Act count. TRADE REG. REP. U.S. ANTITRUST CASES SUMMARIES, Case No. 1422, 66,368 (1957-61).

The Government has inadvertently erred in stating that *United States v. Safeway Stores, Inc.*, 20 F.R.D. 451 (N.D. Tex. 1957) also involved charges under the unreasonably low prices clause. (G. B. 23) The Robinson-Patman Act counts in that case rested entirely upon the second clause of Section 3.

demonstration respondents are in accord. We respectfully disagree, however, when the Government states that the Court "need not concern itself" with what the Government calls "those analytical questions." (*Ibid.*) Those questions are at the root of the constitutional invalidity of this prohibition.

B. The Decisions of This Court Demonstrate That a Prohibition of "Unreasonably Low Prices" Is Not Sufficiently Definite To Satisfy Constitutional Requirements.

1. A Long Line of Constitutional Decisions Has Established the Invalidity of a Reasonableness Test for Prices.

The clause in issue makes reasonableness the basic criterion by which to distinguish legal from illegal prices. But the Court has tested the constitutional adequacy of reasonableness as a standard for demarcation of illegal prices in our competitive economy and has found it wanting. In every instance in which the question has been put to it, beginning with the leading decision in *United States v. L. Cohen Grocery Company*, 255 U.S. 81 (1921), the Court has held attempts to outlaw "unreasonable" prices to be unconstitutional.

The *Cohen Grocery* case involved the validity of the Lever Act which imposed a penalty upon any person who "wilfully" made "any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries." (255 U.S. at 86) Whether these words prohibiting unreasonable prices "constituted a fixing by Congress of an ascertainable

standard of guilt and are adequate to inform persons accused of violation thereof of the nature of the accusation against them" was the question posed. "That they are not" the Court thought obvious from their "mere statement." Nevertheless, it articulated the reasons for its decision, and the rationale is equally applicable to the "unreasonably low prices" clause here at issue:

> "Observe that the section forbids no specific or definite act. It confines the subject-matter of the investigation which it authorizes to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against." (255 U.S. at 89)

The Court pointed out that in earlier cases upholding statutes as sufficiently definite, none of which involved the legality of prices, "either from the text of the statutes involved or the subjects with which they dealt, a standard of some sort was afforded." (255 U.S. at 92)

The Court followed the *Cohen Grocery* precedent in a series of contemporaneous cases also involving the Lever Act.[14] And in *A. B. Small Company v. American Sugar*

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14. *Tedrow v. A. T. Lewis and Son Dry Goods Company*, 255 U.S. 98 (1921); *Kennington v. Palmer*, 255 U.S. 100 (1921); *Kinnane v. Detroit Creamery Company*, 255 U.S. 102 (1921); *C. A. Weed and Company v. Lockwood*, 255 U.S. 104 (1921); *G. S. Willard Company v. Palmer*, 255 U.S. 106 (1921); *Oglesby Grocery Company v. United States*, 255 U.S. 108 (1921). In *Weeds v. United States*, 255 U.S. 109, 111-112 (1921) the same rationale voided a different section of the Lever Act purporting to prohibit "conspiracies to exact excessive prices."

Refining Company, 267 U.S. 233 (1925) it held the Lever Act's blanket proscription of unreasonable prices unconstitutionally indefinite even for civil purposes, pointing out that no workable standard was provided:

> "The federal statute contained no provision pointing to what should be deemed a . . . reasonable . . . price; and there was no accepted and fairly stable commercial standard which could be regarded as impliedly taken up and adopted by the statute. . . . While sugar has a market value, that value is subject to fluctuations which individual manufacturers and dealers can neither control nor readily foresee. The price in one trade center is affected by that in others, and in all there are material variations, even in short periods." (*Id.* at 240-241)

The same question was presented again in *Cline v. Frink Dairy Co.*, 274 U.S. 445 (1927) testing a state statute outlawing certain conspiracies in restraint of trade unless "their purpose shall be to obtain only a reasonable profit . . ." (274 U.S. at 456). In an opinion by Mr. Chief Justice Taft the Court unanimously held the statute "so vague and uncertain [that it] . . . violates due process and cannot be distinguished from the case of *United States v. Cohen Grocery Company* . . ." (274 U.S. at 453-54). Such an exception in the statute, the Court said, "leaves the whole statute without a fixed standard of guilt . . ." (274 U.S. at 457)

Very recently the Court noted the relevance of these leading cases to the "unreasonably low prices" clause. In *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373, 378 (1958), Mr. Justice Harlan, speaking for the majority, referred to the clause as a "vague provision" and pointed out:

> "The District Court indicated that the vagueness of the 'unreasonably low prices' provision might give rise to constitutional difficulties, if such questions had to be faced. Cf. *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, *Cline v. Frink Dairy Co.*, 274 U.S. 445. See Comment, 55 Mich. L. Rev. 845, 853-56 . . . ."

Indeed, the Court has consistently rejected reasonableness and comparably general indicators of legality as too vague to serve as standards of criminal guilt in complex economic situations. In *International Harvester Co. v. Kentucky*, 234 U.S. 216, 221 (1914), the Court invalidated a provision for prices based on "market value under fair competition, and under normal market conditions." To compel [businessmen . . . to guess at peril of indictment" the outcome of so complicated and contingent a question, the Court said in language directly applicable to the "unreasonably low prices" clause, "is to exact gifts that mankind does not possess." *Id.* at 223-24. The Court has repeatedly objected to similar provisions: *Connally v. General Construction Company*, 269 U.S. 385, 391-93 (1926) involving

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12. Id., n. 7. While the dissenting opinion in the *Nashville Milk* case, by Mr. Justice Douglas, urged that Section 3 is a proper foundation for private suits, the opinion was addressed to the section as a whole and mentioned particularly only its price discrimination prohibitions. The constitutional status of those provisions, however, may be different from the status of the "unreasonably low prices" clause which is not qualified by the definite requirement of discrimination.

13. The same result was reached in the companion cases of *Collins v. Kentucky*, 234 U.S. 634 (1914), *Malone v. Kentucky*, 234 U.S. 639 (1914) and *American Seeding Machine Company v. Kentucky*, 236 U.S. 660 (1915).

"current rate of per diem wages in the locality"; *United States v. Pennsylvania Railroad Company*, 242 U.S. 208, 237-38 (1916); reasonable request or notice, normal shipments; *Champlin Refining Co. v. Corporation Commission of Oklahoma*, 286 U.S. 210 (1932), waste; *Musser v. Utah*, 333 U.S. 95 (1948) "conspiracy to commit . . . acts injurious to public health, . . . morals, . . . trade or commerce." See also *United States v. Shreveport Grain and Elevator Co.*, 287 U.S. 77 (1932), implying that the statute would be unconstitutional if construed as directly prohibiting "unreasonable variations" between actual and marked weight. Cf. *Smith v. Cahoon*, 283 U.S. 553, 564 (1931).

2. Antitrust Decisions of This Court Confirm That Reasonableness Is Not an Adequate Statutory Standard for Prices.

The provision challenged here presents the question of the constitutionality of a "reasonableness" test of prices in the context of antitrust policy for unregulated segments of the economy. The Court has repeatedly held that reasonableness of prices cannot be satisfactorily determined by the courts in competitive situations because of the inherent uncertainty of any concept of "reasonable price" and because the reasonableness of prices does not determine whether competition has been unreasonably diminished.

Since adoption of the rule of reason as the standard of construction of the Sherman Act in *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911), the Court has consistently refused to judge the reasonableness of prices in antitrust cases. Explaining this position in *United*

States v. Trenton Potteries Co., 273 U.S. 392 (1927), a price-fixing case, the Court relied expressly on the constitutional decisions, stating, per Mr. Justice Stone:

> "Moreover, in the absence of express legislation requiring it, we should hesitate to adopt a construction making the difference between legal and illegal conduct in the field of business relations depend upon so uncertain a test as whether prices are reasonable,—a determination which can be satisfactorily made only after a complete survey of our economic organization and a choice between rival philosophies. Compare *United States v. Colgate & Co.*, 250 U.S. 300; *United States v. Cohen Grocery Co.*, 255 U.S. 81; *International Harvester Co. v. Kentucky*, 234 U.S. 216; *Nash v. United States*, *supra*." (273 U.S. at 398)

The Court repeated its rejection of a reasonable price test in the leading case of *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). The Court held price-fixing to be unreasonable "per se" because inherently inconsistent with the maintenance of competition. But this conclusion of per se unreasonableness was sharply distinguished from the wholly different question of the reasonableness of prices fixed, with which the Court would have nothing to do. In the language of Mr. Justice Douglas:

> "If the so-called competitive abuses were to be appraised here, the reasonableness of prices would necessarily become an issue in every price-fixing case. In that event the Sherman Act would soon be emasculated; its philosophy would be supplanted by one which is wholly alien to a system of free competition; it would not be the charter of freedom which its framers intended.

> "The reasonableness of prices has no constancy due to the dynamic quality of business facts underlying price structures. Those who fixed reasonable prices today would perpetuate unreasonable prices tomorrow, since those prices would not be subject to continuous administrative supervision and readjustment in light of changed conditions."[14] (310 U.S. at 221)

The experience of this country has been that, when necessary in regulated segments of the economy, the administration of a standard of reasonableness of prices requires, as the opinion in *Socony-Vacuum* states, "continuous administrative supervision and readjustment in light of changed conditions." Accordingly the determination of reasonable railroad rates has been committed to the Interstate Commerce Commission, and of reasonable rates for airlines, natural gas pipelines and other regulated industries to other agencies. The historic doctrine of "primary administrative jurisdiction" was developed first in *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907) in recognition of the uncertainties inherent in determination of reasonable rates. Under this doctrine the courts refrain from liti-

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14. This doctrine has been applied consistently whether the prices fixed have been claimed to be high or low (*United States v. Trenton Potteries Co., supra*, involving fixing of high prices; *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211 (1951), involving fixing of maximum, *i.e.*, low prices), showing that there can be no basis for distinguishing the statute in *Cohen Grocery*, directed at high prices, from the "unreasonably low" interdict of the clause in issue here.

gating reasonableness issues for the same reasons of complexity and uncertainty which render the "unreasonably low prices" clause invalid as a judicial standard. *United States v. Radio Corp. of America*, 358 U.S. 334, 346-48 (1959).

In World War II, Congress avoided the mistake of the Lever Act by establishing an administrative agency under the Emergency Price Control Act for the comprehensive control of prices. The complexities and difficulties which confronted the Office of Price Administration in its monumental task of determining proper price levels are well-known to the Court. Section 3 of the Robinson-Patman Act would call upon the trial courts to decide the same kind of price questions without standards, experience, or any centralized guidance. And their decisions would have not mere future effect, but would adjudicate, in a criminal proceeding with the liberty of individual defendants possibly at stake, the rightness or wrongness of past conduct.

3. Decisions Relied Upon by the Government Did Not Involve Situations Analogous to the "Unreasonably Low Prices" Clause.

The Government's attempt to overcome the force of this long line of precedent rests primarily on *Nash v. United States*, 229 U.S. 373 (1913), upholding Section 1 of the Sherman Act, and *United States v. Ragen*, 314 U.S. 513 (1942) upholding the Internal Revenue Code's prohibition of tax evasion accomplished by deliberate padding of busi-

ness expenses, reasonable deductions for which are allowed.[15] The *Nash* case was expressly considered in the *Cohen Grocery* and *Cline* opinions, both of which distinguished the question of unreasonable restraint of trade from that of unreasonable prices. The author of the *Nash* opinion, Mr. Justice Holmes, joined in the Court's opinions in both *Cohen Grocery* and *Cline*.

The Sherman Act was upheld because its language referred to and attained certainty from the common law. As Mr. Chief Justice Taft explained in *Cline* (274 U.S. at 460), in *Nash* "we held that the common law precedents as to what constituted an undue restraint of trade were quite specific enough to advise one engaged in interstate trade and

15. The other cases cited in the Government's brief (G.B. 24-27) on this point are not relevant here. The statutes in *Ratner v. California*, 321 U.S. 755 (1944), *Miller v. Oregon*, 273 U.S. 657 (1926), *Boyce Motor Line v. United States*, 342 U.S. 337 (1952), and *Sproles v. Binford*, 286 U.S. 374 (1932), relate to negligence situations, discussed *infra*, p. 32-33; see also the detailed explanation of *Miller v. Oregon* in *Cline v. Frink Dairy Co.*, 274 U.S. at 464-465 (1927). *Boyce* and *Sproles* invoke, beyond the common law standards of due care, a standard based on distance and actual alternative routes. Standards invoked by the statutes tested in the remaining cases are also definite: *United States v. Petrillo*, 332 U.S. 1 (1947) (coercion); *McGowan v. Maryland*, 366 U.S. 420 (1961) (products actually sold at beaches and amusement parks in the area); *United States v. Spector*, 343 U.S. 169 (1952) ("timely" defined by the statute to mean six months and "necessary" to mean the legal requirements for entry into an identified country). In *Bandini Petroleum Co. v. Superior Court*, 284 U.S. 8, 16-18 (1931) the statutory language had been given a definite and workable construction based on technological developments in the industry known to those affected by the statute.

commerce what he could and could not do under the statute."

Quoting from his early and now celebrated opinion in *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 293 (6th Cir. 1898), the Chief Justice said in *Cline* (274 U.S. at 462) that whether there is an undue restraint of trade does not rest on so "'shifting, vague, and indeterminate a standard'" as does the question of "the reasonableness of prices." *Cohen Grocery* was not inconsistent with *Nash*, the *Cline* opinion pointed out, because *Nash* "did not relate to the reasonableness . . . of prices charged for necessaries, without more, as the basis for criminality, while . . . *Cohen Grocery* plainly did.[16]"

United States v. Ragen, 314 U.S. 513 (1942) has in no way diminished the authority and persuasiveness of these decisions. The act prohibited by the statute tested in *Ragen* was the wilful evasion of income taxes which, the Court pointed out, "standing alone, is not vague." (314 U.S. at 523-524) Obviously, whether a businessman has been guilty of tax evasion is a question that invokes an objective and familiar common law standard of determination, fraud, that is not present when the question is merely whether he has set an "unreasonable" price. "Such acts of bad faith," the Court observed, "are not beyond the ready comprehension

16. Id. at 463. The Court added that, for the same reason, *Cohen Grocery* was not inconsistent with *Waters-Pierce Oil Company v. Texas*, 212 U.S. 86 (1909), a case upholding on the common law basis a Texas antitrust statute outlawing, in addition to definitely described activity, "acts which . . . tend to accomplish the prohibited thing, or which make it highly probable that the given result will be accomplished . . ." (212 U.S. at 110).

either of persons affected . . . or of juries called upon to determine violations . . ." (314 U.S. at 524) The type of evasion involved in the particular case, the deliberate padding of business expenses, "reasonable" deductions for which are allowed, did not, the Court held, "so transform the nature of the offense as to make actors less aware that they are committing it or juries less competent to detect it." (*Ibid.*)

Thus both *Ragen* and *Nash* stand on a common law foundation. But, as Mr. Chief Justice Taft's exhaustive analysis of the cases in his *Cline* opinion points out, there is no common law tradition or experience for determination of reasonable prices.[17] Ascertaining whether there has been undue restraint of trade does not depend on establishing the unreasonableness of any price. (274 U.S. at 460-465) Neither does the venerable common law concept of the reasonable man, or reasonably prudent man, go to the determination of prices. The common law has looked to the reasonable man to measure negligence in situations in which community standards provide a test of reasonable behavior and conduct can be measured by common under-

17. Thus in *Ragen* if the provision for reasonable deductions had actually been the sole standard of guilt provided, the *Ragen* statute would still have derived certainty from the common law. Where the padding of expenses for tax purposes is concerned, the reasonably prudent man behaves predictably; in such a situation reasonableness may be viewed as "a standard of behavior . . . consistent with good morals." *American Telephone and Telegraph Co. v. United States*, 299 U.S. 232, 246 (1936). But setting unreasonably low prices is not "conduct traditionally recognized as morally 'wrong.'" *United States v. Harriss*, 347 U.S. 612, 634 (1954) Mr. Justice Jackson dissenting.

standing and practices." *United States v. Petrillo*, 332 U.S. 1, 8 (1947). As pointed out in *Cline v. Frink Dairy Co.*, 274 U.S. 445, 464 (1927):

> "... on an issue like negligence ... every one may be held to observe it either on the civil or criminal side of the court. It is a standard of human conduct which all are reasonably charged with knowing and which must be enforced against every one in order that society can safely exist. ... 'The criterion in such cases is to examine whether common social duty would, under the circumstances, have suggested a more circumspect conduct.' 1 East P.C. 262."

"But this does not justify," the Court said, "holding the average member of society in advance to a rule of conduct measured by his judgment and action in respect of what is a reasonable price. ..." (274 U.S. at 464) "[I]t will not do to hold an average man to the peril of an indictment for the unwise exercise of his economic or business knowledge involving so many factors of varying effect that neither the person to decide in advance nor the jury to try him after the fact can safely and certainly judge the result." (274 U.S. at 465)

The Government's brief itself indicates the difficulty of the problem. The evidence used to evaluate reasonableness in this case on trial may include, it says, "the relationship between ... prices and the seller's costs, the seller's normal price structure, ... the general price levels in the market or industry ... the reasons why a low price was adopted, the expected period for which such a price will be in effect, ... its probable or intended impact upon

competition . . ." (G.B. 12), "business accounts and corporate books," "intracorporate communications . . . historic industry pricing problems, and the expert opinion of those familiar with the industry." (G.B. 22) Indeed, there is hardly any fact remotely relating to a challenged price that could justifiably be kept out of the record. But the ability to predict that all proffered evidence will be considered relevant does not provide a standard by which to evaluate it. Instead, it emphasizes the absence of a standard. See *United States v. L. Cohen Grocery Company*, 255 U.S. 81, 89-91 (1921); *Champlin Refining Co. v. Corporation Commission of Oklahoma*, 286 U.S. 210, 243 (1932).

The lower court here, far from deciding an abstract and hypothetical issue, as the Government suggests, faced the necessity of formulating instructions to a jury which would enable it to determine, by a standard apart from the individual jurors' differing subjective notions about it, whether the welter of statistical material necessarily to be in evidence proved the existence of any "unreasonably low prices." The briefs and argument in the court below were directed to the concrete and obviously fundamental problem of finding such an objective standard in the challenged provision.

Even more difficult is the problem faced by those subject to the statute who must set prices to be used in the future. By contrast, the *Ragen* statute dealt with a comparatively simple situation, a corporate income tax return filed long after the fact. There every relevant fact was fixed: the services rendered, the compensation paid, the reasons, and

the pertinent market conditions. A deduction claimed under such known circumstances is not comparable to a price set, as any price must necessarily be, on the basis of estimates, projections, and pure guess. Indeed, the Court's opinion in *Ragen* distinguished *Cohen* on just this basis: where an unreasonable price is prohibited, no standard was afforded (255 U.S. at 89, 92) whereas in the tax evasion situation "no such unworkable standards" were involved. *United States v. Ragen*, 314 U.S. 513, 523 (1942).[18]

Thus the clear judgment and experience of the Court, developed in a long line of cases, is that "workable standards" are not afforded for those subject to a statute, or for judge and jury, when the legality of a price in criminal cases is made dependent on its "reasonableness."

C. A Statute Which Proscribes No Ascertainable Act Cannot Be Made Constitutionally Definite by Requiring Intent.

The phrase "unreasonably low prices" clearly is not an adequately definite description of a criminal act. Does the additional statutory requirement of showing intent to destroy competition or eliminate a competitor change the

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18. The Court's remark that under the *Ragen* statute, "thousands of corporations have filed income tax returns . . . and there has not been any apparent general confusion . . ." (314 U.S. at 524) contrasts markedly with its observation of the unworkability of the "unreasonably low prices" clause of Robinson-Patman: "it is worthy of note that the Department of Justice has never, so far as we have been able to determine, brought proceedings under this provision . . ." *Nashville Milk Co. v. Carnation Company*, 355 U.S. 373, 378, n. 7 (1958).

result, as the Government argues? (G.B. 29-32) The answer is clear; in the words of Mr. Justice Douglas: "willful conduct cannot make definite that which is undefined." *Screws v. United States*, 325 U.S. 91, 105 (1945); Indeed when the act prohibited is unascertainable, any requirement of intent becomes a nullity. No one can be held to intend something which is unknown and unknowable.

The *Screws* case, which is cited by the Government, illustrates the Court's unwillingness to let an intent requirement substitute for a sufficient description of the act prohibited. The Court upheld Section 20 of the Criminal Code, punishing those who wilfully deprive others of rights guaranteed by the Fourteenth Amendment. Although those rights are not defined in the statute, the determinative opinion written by Mr. Justice Douglas, joined by three others, viewed the protected rights as ascertainable when the statute was construed as limited to rights specified in decisions or other rules of law. The statute having thus been made "in some respects" certain, the additional construction of the statutory word "willful" to require criminal scienter, or acting with the deliberate bad faith intention of doing what the statute prohibits, was held to provide the requisite notice (325 U.S. at 102).[19] Bad faith was

19. Three other cases cited by the Government involved the same statute: *United States v. Classic*, 313 U.S. 299 (1941); *Williams v. United States*, 341 U.S. 97 (1951); *Koehler v. United States*, 342 U.S. 852 (1951), Mr. Justice Jackson dissenting from the denial of certiorari. In *Classic*, the vagueness issue was not raised, Mr. Justice Jackson's opinion in *Koehler* is at variance with the position the Government takes here, and *Williams* simply follows *Screws*.

definitely not considered a substitute for adequate indication of what was outlawed. It was made quite clear that all the bad faith in the world would be insufficient if the statute provided for the punishment of "an unknowable something." The Court said:

> "We repeat that the presence of a bad purpose or evil intent alone may not be sufficient. We do say that a requirement of a specific intent to deprive a person of a federal right made definite by decision or other rule of law saves the Act from any charge of unconstitutionality on the grounds of vagueness.
>
> "Once . . . given that construction, we think that the claim that the section lacks an ascertainable standard of guilt must fail. * * * [Persons who act . . . in open defiance . . . of a constitutional requirement which has been made specific and definite . . . [and] are convicted for so acting. . . . are not punished for violating an unknowable something." (325 U.S. at 103, 105)

On this point of law a majority of the Court were in express agreement. The dissent by Mr. Justice Roberts, joined by Justices Frankfurter and Jackson, pointed out (325 U.S. at 154):

> "'Willfully' doing something that is forbidden, when that something is not sufficiently defined according to the general conceptions of requisite certainty in our criminal law, is not rendered sufficiently definite by that unknowable having been done 'willfully'."[20]

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20. In other cases relied upon by the Government the standard, though sometimes broad, was clearer than in *Screws*. The Espionage Act tested in *Gorin v. United States*, 312 U.S. 19

Indeed, if a requirement of bad faith will save an otherwise unconstitutionally vague statute, the Court would have upheld the statutes involved in *United States v. L. Cohen Grocery Co.*, 255 U.S. 81 (1921) and *Cline v. Frink Dairy Co.*, 274 U.S. 445 (1927). The prohibition of the Lever Act was limited to wilful acts, and the Colorado statute invalidated in the *Cline* case prohibited combinations in restraint of trade only when they were not engaged in for a reasonable purpose. Even the section of the Lever Act prohibiting "conspiracies to exact excessive prices" was held unconstitutional, and it was done in a case brought to this Court after conviction. *Weeds v. United States*, 255 U.S. 109 (1921).

In *Cramp v. Board of Public Instruction of Orange County, Florida*, 82 S. Ct. 275 (decided December 11, 1961) the Court unanimously recognized that criminal intent does not save an otherwise vague statute. The statute in *Cramp* had

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(1941), as construed, outlawed obtaining or delivering things specifically described in the statute, connected with or relating to the national defense, and the Court found "national defense" to have "a well understood connotation"; it said that if the statute described an area of proscription that might include documents that were not secret, "the obvious delimiting words were those requiring . . . bad faith. . . ." (312 U.S. at 27-28) Similarly the act proscribed in *United States v. Petrillo*, 332 U.S. 1 (1947) was ascertainable by reference to "common understanding and practices" (332 U.S. at 8), and in *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337 (1952) by "use of common experience as a glossary" (342 U.S. at 341, quoting from *Sproles v. Binford*, 286 U.S. 374, 393 (1932)). In both cases the requirement of scienter made it even clearer that no one would be convicted without fair warning, but in these, as in the earlier cases discussed by Mr. Justice Roberts in his dissent in *Screws*, scienter is mentioned only "for good measure." (325 U.S. at 156)

been authoritatively construed to include a requirement of criminal intent (325 S.Ct. at 279). But the Court nevertheless found that the provision under attack was "completely lacking in . . . any . . . terms susceptible of objective measurement" and was unconstitutionally vague (325 S.Ct. at 280).

Moreover, in the statute at issue here there is no necessary relationship between the act proscribed and the intent required. Unlike a requirement that a particular statute be wilfully violated, as in *Screws*, the intent here could accompany almost any innocent business act. It does not define or clarify the act proscribed but is independent from it. It thus differs completely from an intent to act illegally which is the kind of intent involved in the cases relied upon by the Government. Thus the intent specified here cannot serve the notice function required by the Constitution because it adds no meaning to nor in any way clarifies the phrase, "unreasonably low prices."

Far from preserving the intent requirement of this statute as an independent standard, the Government's brief shows that its proof of an unreasonably low price in this case will constitute its proof of illegal motive, and vice versa. (G.B. 10-12). Thus the "assurance of protection" which the Government claims is provided by the intent requirement (G.B. 29-32) actually, as Mr. Justice Jackson said, "becomes a hoax" because "the requirement of specific intent is now to be wiped out with a presumption." *Koehler v. United States*, 342 U.S. 852, 854 (1951, dissenting from denial of certiorari).

There is no warrant in the statute itself for this kind of circumlocution. Despite the vagueness of the "unreasonably

low prices" clause its language requires that before conviction can be had there must be separate proof that the price challenged (1) was unreasonably low and (2) was set for the purpose of destroying competition or eliminating a competitor. To say that illegal motive defines the act proscribed is to make the motive a definition of unreasonableness, whereas the language shows Congress must have intended two separate tests. The result of the Government's approach would be a statute quite different from the one Congress wrote, a statute outlawing any price set for the stipulated purpose. Reasonableness would be deleted from the act. Construction of a statute in a manner so clearly at variance with "the natural import of its terms" (*United States v. Shreveport Grain and Elevator Co.*, 287 U.S. 77, 83 (1932)) would in itself constitute a deprivation of fair warning. *United States v. Cardiff*, 344 U.S. 174, 176-177 (1952).

D. The Vagueness of the "Unreasonably Low Prices" Clause Is Increased by Its Incongruity with the Other Provisions of the Robinson-Patman Act and with Antitrust Policy.

While vague language sometimes acquires clarity from its context, the opposite is true of the "unreasonably low prices" clause. Attempt to construe this clause on the basis of its context as part of the Robinson-Patman Act and of antitrust policy merely makes it more inscrutable.

The clause is confusing when related to the remainder of Section 3 of the Robinson-Patman Act, of which it is a part. (See Appendix to this brief.) The whole section bears the heading of "discrimination," and the first two of its

three clauses both deal with discrimination, the first clause relating to discrimination between competing purchasers, and the second to geographical price discrimination. The natural expectation created by this context is that the third clause also would deal with discrimination, an impression made stronger by the fact that all of the clauses constitute a single sentence, separated only by semicolons, and that all have a single subject, grammatically speaking.

The indictment itself reflects the uncertainty of the Government as to whether some kind of discrimination is required. Each Robinson-Patman Act count contains a paragraph alleging that National "utilized the advantages it possesses by reason of the fact that it operates in a great many different geographical localities in order to finance and subsidize a price war . . ." (*E.g.* R 9) This language is suggestive of a geographical price discrimination theory *i.e.*, that defendant "subsidized" low prices in one market by charging higher prices elsewhere. The charge is thus a confusingly vague version of the second clause of the Act, but without ever actually charging the defendants with discrimination.

The Government Brief is permeated with this confusion of the unreasonably low price provision with the subject of price discrimination. The brief contends that in passing the original Section 2 of the Clayton Act in 1914 Congress intended to legislate on unreasonably low prices (G.B. 14). But the original Section 2 dealt solely with *discrimination* in prices, and the House Report which is quoted at length in the brief shows this on its face.

Similarly, the legislative history of the Robinson-Patman

Act in 1936 shows that what concerned Congress was the problem of discrimination. The civil provisions of the Act, which amended Section 2 of the Clayton Act and which were based on the Robinson-Patman bill, all deal with discrimination. (See Appendix to this brief.) Also, as the government admits, hearings on the Borah-Van Nuys bill were "primarily concerned with price discrimination." (G.B. 16) As pointed out above, as a separate prohibition apart from discrimination the unreasonably low prices clause received scant Congressional attention. While the Government has cited a few references to the clause, they are isolated and unilluminating. The Government brief expressly submerges the unreasonably low prices clause in the subject of discrimination when it states that one of the "chief aims of the legislation was to strengthen, and thus to make more effective, *the various prohibitions of the Clayton Act on geographic price discrimination, including the ban on predatory selling below cost.*" (G.B. 15; emphasis added)

The same confusion of the two subjects occurs in the brief's citation of cases which it says illustrate past recognition by the courts and the Federal Trade Commission of problems of unreasonably low prices. The case of *Porto Rican American Tobacco Co. v. American Tobacco Co.*, 30 F. 2d 234, 237 (2d Cir. 1929) (cited in G.B. 13) plainly was not a mere low price case. It was brought under the original price discrimination provisions of Section 2 of the Clayton Act and is a classic case of geographical discrimination of the kind dealt with in the second clause of Section 3, not in the third clause. Also, *Federal Trade Commission v. Anheuser-Busch*, 363 U.S. 536 (1960) and *Moore v.*

Mead's Fine Bread Co., 348 U.S. 115 (1954), (cited at G.B. 14) both involved allegations of discrimination through selling at prices which were lower in one market than those charged in other markets. The other cases cited by the Government were Sherman Act cases involving charges of monopolization or conspiracy and are even less relevant here.[21]

Equally vexatious problems of meaning arise in comparing Section 3's criminal prohibitions with the civil prohibitions of Section 2 of the Clayton Act, as amended. (See Appendix to this brief.) The "unreasonably low prices" clause has no parallel in Section 2. Further, the prohibitions of Section 2(a) against discrimination in price are expressly qualified by the requirement that adverse effect on competition must be shown (*Federal Trade Commission v. Morton Salt Co.*, 334 U.S. 37 (1948); *Federal Trade Commission v. Anheuser-Busch, Inc.*, 363 U.S. 536 (1960)), and three important substantive defenses to price discrimination are expressly provided by the statute: cost justification, changing market conditions and good faith meeting of a competitor's equally low price. *Standard Oil Co. v. Federal Trade Commission*, 340 U.S. 231 (1951).

In contrast, Section 3 makes no provision either for a test of effect on competition or for any substantive defense. This situation is the exact opposite of what would reasonably be expected. Criminal prohibitions customarily are differentiated from civil prohibitions by requiring more,

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21. *United States v. American Tobacco Co.*, 221 U.S. 106, 160-61 (1911); *American Tobacco Co. v. United States*, 328 U.S. 781, 807 (1946); *United States v. Corn Products Refining Co.*, 234 Fed. 964 (S.D.N.Y. 1916).

not less, culpable conduct than required for civil offenses and by providing for more, not less, opportunity to defend. No doubt this anomolous departure was due to the fact that Section 3 was not drafted by those who sponsored the civil provisions, but was of independent origin, and in order to insure passage was tacked on to the civil provisions without any reconciliation of the substantive differences. But the result, in the words of a student of the history of the Robinson-Patman Act, was a "melange of partially incongruous and often vague provisions."[22]

All attempts to reconcile the confusing inconsistencies of these two sections are confronted with the severe problem described by Congressman Celler when the House Conference Report was being discussed in 1936. He stated:

> "In an endeavor to get some sort of an agreement, the so-called Borah-Van Nuys provisions of the Senate Bill were grafted onto the House bill, and we have what might be termed in common parlance somewhat of a 'hodgepodge'. . . . when you try to read them both together you have the greatest difficulty. You have the herculean task to make it yield sense." (80 Cong. Rec. 9419)

Finally, grave doubts concerning the meaning of the unreasonably low prices clause are greatly deepened when the clause is set down in the broad context of the antitrust policy governing price competition. As pointed out above, the Court has repeatedly refused to substitute the judgment of the courts for that of the market as to the reasonableness of prices. This is because ever since 1890 the Court has adhered to the proposition that the "heart of

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22. PALAMOUNTAIN, THE POLITICS OF DISTRIBUTION 228 (Harv. Univ. Press 1955).

our national economic policy" is "faith in the value of competition," *Standard Oil Co. v. Federal Trade Commission*, 340 U.S. 231, 248 (1951), and that competition in price is so vital a form of competition that it is protected by the rule of "per se" unreasonableness from restraints upon it. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927).

While government may of course impose restraints upon competition which would not be tolerated if privately imposed, *Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961), private citizens have been taught that vigorous low-price competition is one of our highest economic values. Antitrust policy thus leads businessmen to believe that the "unreasonably low prices" clause does not mean, as the Government here says it does, that one who competes vigorously by a policy of low prices thereby treads at all times on the borderline of criminal illegality. This background makes the meaning of the "unreasonably low prices" clause even more difficult to ascertain than it would be if our basic policy were not so heavily oriented in favor of price competition.

The requirement of the "unreasonably low prices" clause of showing an intent to destroy competition, in which the Government brief continually tries to find a solution for all of the statute's problems of vagueness, far from contributing clarity, adds to the difficulty when seen in this context. In competition, some succeed at the expense of others, and each individual competitor acts with the intention of being among those who succeed. All of his business decisions are intended to get business and, unless

he enjoys a monopoly, he intends to take business from others. In this battle for economic survival price is a primary competitive weapon and rarely, if ever, is a competitive decision on price reached free of any contemplation of economic detriment to others.

The intent made suspect in the "unreasonably low prices" clause differs from this normal economic objective only as a matter of degree which is extremely difficult to determine. Businessmen who are fully advised of the consequences of the Government's theory may believe that to be sure of complying with the statute they should reject the ordinary economic objective of price competition. Safety will seem to lie only in keeping prices at the same level as, or higher than, those of competitors. Even this may not prevent accusation. As this case demonstrates, indictment may follow merely from meeting a competitor's price. (R 37-38) And if the price is considered to be "below cost", it will be presumed by the Government to have been set with the intent the statute condemns. (G.B. 10-12)

Anticipating these objections, the Government says (G.B. 20) that it is not "unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line" (quoting *Boyce Motor Lines v. United States*, 342 U.S. 337, 340 (1952)). But it is manifestly unfair to impose the risk of criminal conviction when the line is not visible, and then to add that one will be found guilty if, as he approaches the unseen line, his outlook is the one he is ordinarily encouraged to have. It is not "familiar to the criminal law" to make anyone take such a risk. *United States v. Wurzbach*, 280 U.S. 396, 399 (1930).

E. The Defective Vagueness and Dubious Validity of the "Unreasonably Low Prices" Clause Have Been Expressly Recognized by the Department of Justice and by Most Writers.

The extraordinary nonuse of the "unreasonably low prices" clause by the Department of Justice evidently has been due to its serious doubts as to the meaning of the language. In 1960, the Department opposed on grounds of vagueness the use of the same words in a bill intended to establish civil remedies for "unreasonably low prices" and for other purposes. Its views were stated in a letter to the Committee on Interstate and Foreign Commerce of the House of Representatives, signed by John D. Calhoun, Acting Deputy Attorney General.[23] The bill was introduced by Representative Patman and was designed to overrule *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373 (1958). It provided that prohibitions similar to those contained in Section 3 should be violations of the Federal Trade Commission Act and should also be available for private suits. The bill was more specific than Section 3, however, in that it included provisions for definition of the "unreasonably low prices" clause. The Department opposed the bill stating:

> "These bills would carry over many of the ambiguities inherent in the present language of section 3 of the Robinson-Patman Act and would add to them other difficulties and uncertainties, as indicated above." (Hearings, 7)

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23. *Hearings Before a Subcommittee of the House Committee on Interstate and Foreign Commerce on H.R.* 10235, 86th Cong. 2d Sess., 6-7 (1960).

The great difficulty involved in formulating any clear meaning for a prohibition of "unreasonably low prices" is shown by the Department's conclusion that the definitions of the Patman bill not only did not remove ambiguities, but instead added further "difficulties and uncertainties." After the bill was revised and reintroduced in the First Session of the 87th Congress as H.R. 127, the Department of Justice again opposed it for the same reasons, by letter of William A. Geoghegan, Assistant Attorney General.[24]

It is extremely odd that the Government refers to the views of Representative Patman to support its contention that the "unreasonably low prices" clause of the present statute can be given a constitutionally definite meaning. (see G.B. 17 at n. 5) The bills introduced by Mr. Patman, by their attempt to provide a detailed set of definitions, reflect a clear belief that the phrase as it stands in Section 3 is too vague. This belief is the same held by Mr. Patman in 1936 at the time of passage of the Act. On the floor of the House, he attacked the Borah-Van Nuys bill, which became Section 3, on the ground that it was "very hastily drawn." Expressly criticizing the unreasonably low prices clause, he called it "very indefinite as to what is an unreasonably low price." (80 CONG. REC. 8227, 8228)

This belief was shared by other Congressional leaders. Congressman Celler, as pointed out above, opposed the Borah-Van Nuys bill because the incongruities produced by attaching it to the original Robinson-Patman bill made interpretation a "herculean task." (80 CONG. REC. 9419)

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24. B.N.A., ANTITRUST & TRADE REG. REP., p. A-2 (Aug. 22, 1961).

The detailed review of the legislative history by Professor Palamountain points out that the Senate generally failed to resolve these incongruities because of "inability to agree on policy when confronted with the conflicting demands of independents, manufacturers, and mass distributors."[25] The result is a combination which is so incongruous and vague that in context Section 3 "may not" have "any meaning."[26]

That the vagueness of the provision in issue raises grave constitutional doubts has been the consensus of students of the subject. The Report of the Attorney General's National Committee to Study the Antitrust Laws (1955) concluded:

> "Doubts besetting Section 3's constitutionality seem well-founded; no gloss imparted by history or adjudication has settled the vague contours of this harsh criminal law." (*Id.* at 201)

The same doubts have beset writers who have specifically analyzed the problem. Comment, 55 MICH. L. REV. 845, 853 (1957); Comment, *Federal Remedies Available Against One Who Sells at An Unreasonably Low Price*, 9 INTRA L. REV. (N.Y.U.) 239, 242-44 (1954); Note, 100 U. OF PENN. L. REV. 1058, 1060-61 (1952); Comment, *The Meaning and Judicial Interpretation of Section 3 of the Robinson-Patman Act*, 49 NW. U.L. REV. 273, 292-93 (1954); Note, 108 U. OF PENN. L. REV. 116, 122 (1959).

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25. THE POLITICS OF DISTRIBUTION 228 (Harv. Univ. Press, 1955).

26. *Ibid.* at 231.

Indeed, it is a fair summary of the views of the writers to say that the "unreasonably low prices" clause has acquired a general reputation for dubious constitutional status. It remains for the Court to give final approval to what has been from the beginning a general belief that this unique statutory provision will fall before the mandates of the Fifth and Sixth Amendments. In view of its nonuse by the Department of Justice and its unavailability for use by any other agency or person, its disappearance is not likely to weaken antitrust enforcement.

III. THE CONSTITUTIONALITY OF THE "UNREASONABLY LOW PRICES" CLAUSE CANNOT BE TESTED IN TERMS OF SALES BELOW COST

The Government seeks to preserve the indictment in this case by arguing that, whatever the statutory phrase "unreasonably low prices" may mean, it should at least be construed to mean selling below cost. It has already been pointed out that the indictment in this case is not limited to sales below cost, and that even if it were the constitutional validity of the statutory provision must be tested by considering its language rather than the language of the indictment.

In any event, the Government's theory is unsatisfactory on the merits. Selling below cost is not what the statute prohibits, and the "unreasonably low prices" clause cannot be construed in the way attempted by the Government. Further, even if the Government's construction were possible,

the result would merely be to substitute one indefinite and impracticable standard for another. For without detailed definition "cost" has no settled meaning either in common understanding or in law.

A. Selling Below Cost Is Not Inherently Unreasonable.

The whole thesis of the appeal rests upon a premise which cannot withstand analysis. The Government states:

> "Selling below cost in the absence of special circumstances is explicable only as part of a campaign to destroy competition; and it inevitably will have that effect." (G.B. 10)

The flaw in the Government's approach lies in the attempt to make "sale below cost" equal "sale at an unreasonably low price." The flaw is that though the phrase, "sale below cost," may indicate a kind of sale at a "low price," it plainly is not in itself synonymous with "unreasonable" conduct. This is shown by the Government's own acknowledgment of what it calls "special situations" where selling below cost would be at prices which are reasonably, not unreasonably, low. (G.B. 11.) The brief enumerates a few: disposing of excess inventory; selling obsolete or spoiling merchandise; closing out a line which the seller wishes to discontinue; introducing a new product or breaking into a new market; and meeting competition in good faith.

These "special situations" obviously occur frequently enough to show that "sale below cost" is not equivalent to sale at "unreasonably low prices." But the Government's list is far from complete. Undoubtedly the Government

would also acknowledge other situations where sales below cost would be reasonable, including the following: sales which prove to be below cost because the seller has overestimated the volume he would sell at the announced price; sales which are below cost because costs unexpectedly increase during the selling period and the seller is unable to raise prices because of contract obligations, or because of competition; sales which are below cost because the seller is less efficient than competitors, and is losing out in the competitive struggle; sales which are below cost because of inefficiency, but which are made in order to stay in the market while more efficient methods are introduced; sales of items which are carried for the convenience of customers whose main patronage is as to other products; and sales made to stimulate business, such as two-for-one promotions and "one-cent" sales, or sales of one product at a low price for the purpose of advertising the seller's whole business.[27]

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27. Such sales for advertising or promotional purposes are sometimes called "loss leader" sales. The Department of Justice and the Federal Trade Commission historically have vigorously opposed "Fair Trade" legislation designed to prevent such sales by legalizing resale price maintenance. REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 153 (1955). The Government has vigorously prosecuted under the Sherman Act sellers who undertake to prevent "loss leader" sales by actions which are outside the ambit of Fair Trade exemptions. *United States v. Parke Davis & Co.*, 362 U.S. 29 (1960); *United States v. McKesson & Robbins*, 351 U.S. 305 (1956). The Court itself has been alert to condemn the use of court process to enjoin such selling in the absence of a clear exemption. *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951). The Government would therefore presumably agree that so-called "loss leader" selling is not always unreasonable.

It is thus obvious that there are a great many situations in which selling below cost cannot be regarded as improper conduct. In 1960, there were 15,445 industrial and commercial business concerns which failed. (Statistical Abstract of the United States, 1960, 498) In the same year, there were almost 4,000 bankruptcy cases filed in the District Courts involving bankrupt merchants and manufacturers. (*Id.* at 500) Many, if not most, of these failing enterprises undoubtedly were forced to make substantial sales at unprofitable prices. The Government argument overlooks the fact that the usual result of selling below cost for a substantial period is not destruction of competition, as it claims, but failure of the unfortunate concern which for any reason must make such sales.

In contrast to the frequency of innocuous reasons for below-cost sales, such sales for unjustified reasons are rare, in so far as reported cases are concerned. Although the Government contends that the "whole history of antitrust law" confirms the impropriety of selling below cost (G.B. 12), it cites very few antitrust cases which it claims involved such selling. (G.B. 13)

Further, the cases cited do not hold that selling below cost is in itself unreasonable. In *United States v. American Tobacco Co.*, 221 U.S. 106 (1911), selling below cost was not condemned in itself; it was only one of many practices, many of which were plainly lawful by themselves, from which a conclusion of illegal monopolizing was drawn. In the later case of *American Tobacco Co. v. United States*, 328 U.S. 781 (1946), the price cutting which occurred was attacked because it was done pursuant to a conspiracy to

monopolize, and it was the conspiracy which was the crux of the illegality. *United States v. Corn Products Refining Co.*, 234 Fed. 964 (S.D.N.Y. 1916), was another case in which selling below cost was only one of many acts engaged in by an illegal combination. The fact that this case did not hold going below cost to be the essence of the wrong is shown by the Government's own reference to the same case elsewhere to show that selling at prices *above* cost may also be "unreasonable." (G.B. 21, n.7) *Porto Rican American Tobacco Co. v. American Tobacco Co.*, 30 F.2d 234 (2d Cir. 1929) was a case in which the crux of the illegality was price discrimination, rather than below-cost sales. By re-aligning the order of its phraseology, the Government brief (10-11) obscures the import of the opinion in *Ben Hur Coal Co. v. Wells*, 242 F.2d 481 (10th Cir. 1957). There the court did not hold that selling below cost inherently constitutes selling at unreasonably low prices. It stated: "It would be . . . inadmissible to say that one who consistently sells at a loss *without competitive compulsion* is not selling at unreasonably low prices." (242 F.2d at 486, emphasis supplied) The qualification, "without competitive compulsion," and the word, "consistently," both show that the court had well in mind the many business situations which will necessitate selling below cost, and the statement is far from declaring such sales to be presumptively wrongful.

Confronted with the fact that there are so many "special situations" that they virtually swallow its generalization that selling below cost is "explicable only as a part of a campaign to destroy competition," the Government tacitly acknowledges that selling below cost cannot alone be equated with

"unreasonably" low pricing. It does so by putting to one side the situations of valid selling below cost, stating that they are not prohibited by the statute because they are not done with intent to destroy competition. G.B. 11. It then states that "unreasonably low" means "sales below cost with such purpose", or "predatory sales below cost". G.B. 15.

There are two subtle fallacies in this approach. The first is a familiar form of question-begging. The assertion that sales below cost are "explicable only as a part of a campaign to destroy competition" is proved by defining "sales below cost" as "sales below cost with predatory intent." The second fallacy consists in twice using the statute's test of intent to destroy competition. Predatory intent would first have to be found in order to bring the transaction within the class of "unreasonably low prices." The same proof would then be used over again to establish that the prices were illegal. This use of predatory intent to satisfy both parts of the statute's burden would make nonsense of the "unreasonably low prices" clause and results from the strained effort to rewrite the law. This is not the statute which Congress enacted.

Neither the legislative history of Section 2 of the Clayton Act in 1914 nor that of the Robinson-Patman Act in 1936 shows, as the Government claims, a recognition that "selling below cost should be prohibited as a dangerous device for destroying competition." G.B. 13. This statement is obviously incorrect as a characterization of legislative intent in 1914, for the original Section 2 of the Clayton Act dealt only with price discrimination and did not contain any

kind of prohibition either of unreasonably low prices or of sales below cost.

More importantly, there is no support for the contention that the legislative history of the "unreasonably low prices" clause in 1936 shows that Congress believed that it was enacting a prohibition of sales below cost. If selling below cost had been the well-recognized evil that the Government claims, Congress would have dealt with the matter expressly, but it did not do so.

Further, the references to the hearings claimed by the Government to show that Congress intended to legislate on selling below cost do not support the assertions made in the brief. (G.B. 16) In none on S. 4171, before the Senate Judiciary Committee, 74th Cong., 2d Sess., did the remarks made single out below-cost selling as a pernicious evil in itself, apart from discrimination, or state that the purpose of the "unreasonably low prices" clause was to prohibit such sales. Examined in the order of the Government's references, at page 14 of the hearings the testimony consisted of a question as to whether chain store use of "loss leader" selling was objectionable and an answer by the witness, a member of the Harvard Business School faculty, that the use of "loss leaders" was not confined to chain stores but "has been a method of sales promotion for a great many years." The testimony at page 18 consisted of a question as to whether selling below cost should be permitted to meet competition, with the answer of the witness that one who sells below cost for very long "will undoubtedly go bankrupt." The testimony at page 64 does not even mention sales below cost, and while the

witness referred to the unreasonably low prices clause briefly, he disapproved of the use of criminal penalties for this provision. At pages 85-86, the witness did not attack selling below cost as such, but did attack the use of "loss leader" selling, which he erroneously believed was covered by the bill. At page 53, Senator Borah did not say what he is quoted as saying in the Government brief, *i.e.*, he did not say that his bill was intended "'to stop' 'selling at less than cost.'" (G.B. 16) What Senator Borah said was, "... we want to stop *that*." (Emphasis supplied) The antecedent of the word "that" is ambiguous, but may well have been the practice being discussed by the witness and another Senator of selling to *some* customers at below cost, while selling to others at higher prices, *i.e.*, discriminatory sales.

The outstanding fact about the legislative history, as previously pointed out, is that the bill was borrowed from Canada with no reported meaning having been attributed there to its provisions. The Government, it will be noted, does not contend that there is any Canadian authority for reading "sales below cost" as an equivalent of unreasonably low prices. The bill was passed by Congress with no definitive exposition of the "unreasonably low prices" clause. The effort to find in this sparse record authority for the sales below cost theory of the Government is therefore misleading and futile.

There is thus no basis in the language of the statute, in the cases, or in history, for the radical rewriting attempted by the appellant's brief.

B. "Selling Below Cost" Is a Vague and Indefinite Standard.

Even if it were possible to read the unreasonably low prices clause as if it were a prohibition of selling below cost, the statute would not be sufficiently definite to satisfy Constitutional requirements. As an abstract concept, "cost" may be readily understood. But "cost" is not a sufficiently definite standard to serve as a dividing line between legal and criminal conduct, unless it is carefully defined.

In order for a seller to know whether his price in a given sale is "below cost," he must answer at least two basic questions. He must know what kind of costs are to be included, and he must know what method is to be used to determine those costs. He must know both things before the sale is made. But neither question can be answered by reference to the statute. The statute provides no definitions, and the Government brief has offered none. Instead, the brief contends that ascertainment of cost is not difficult, and that judges and juries can "easily" determine appellee's guilt or innocence on the basis of "cost." (G.B. 21) But nowhere are these gratuitous assumptions supported by any definitive demonstration of what the governing costs will be or how they are to be determined.

The term "cost" may refer to greatly different things. It may refer to the cost of the defendant, or it may mean the cost or costs of other members of the industry. While it might seem at first glance that the seller's own cost should be determinative, the formulation of a general rule based upon this assumption may be impracticable. It must

be remembered that the costs of different firms are usually different. Accordingly, there are situations in which it might be argued that the purposes of the law might be better served by adopting some other test of relevant cost. Suppose the defendant's costs are lower than those of his competitors, and that he persistently sells at prices which are always below their costs but which are profitable to him. Will he be safe in assuming that the Government will not prosecute him, even if he should eliminate all his competitors? Or conversely, suppose that a seller's costs are higher than those of competitors. Does the statute impose upon him the risk of violation if he goes below his own cost, or would it not seem more reasonable to say that in such a case he may use his competitor's cost as a standard? The situation is, of course, much more complicated if there are several competitors each with different costs. Which one will govern, or will some kind of average cost be used?

Even if it were clear whose cost will govern, it would still be unclear as to what costs will be included in the computation, and here again the statute supplies no guidance. The most easily ascertained cost, especially for retailers, would be the direct cost of goods sold. Retailers, with stores handling hundreds or thousands of different items, might reasonably believe that "sale below cost" would mean sale below the invoice cost of the merchandise. Such retailers obviously seldom know, or can take time to consider, their other costs when pricing a single item in a store-full of items. Also, processors such as dairy concerns might in some instances believe that they were not selling below cost for purposes of such a statute as this if they sold one of their

products above the cost of the major raw material used. These uncertainties as to what would constitute below-cost sales are greatly increased by the fact that, in deciding whether to make a given sale, a businessman naturally will reflect the familiar maxim of economics that operations are not unprofitable if they produce revenue which covers marginal cost.

But it will probably be contended by prosecutors that "cost" must include total actual costs, and not only all direct costs but also a proper allocation of the indirect costs of doing business. Again the statute provides no guidance on this subject, which is enormously complicated by a variety of factors which will greatly alter the result. The difficulties are well stated by the Department of Justice letter to the House Interstate and Foreign Commerce Committee in 1960, opposing H.R. 10235 in the 86th Congress, Second Session (*supra*, p. 47). The bill defined "unreasonably low prices" as including a sale "at a price below cost as such term is defined by the law" of an applicable state sales-below-cost statute. In the absence of a state law, the bill provided the following definitions for sales below cost:

> "(1) in the case of a producer, a sale at a price less than the cost of manufacturing, packaging, and selling a commodity together with the payment of such transportation costs as are actually borne by a producer; and
>
> (2) in the case of any other vendor, a sale at a price less than the invoice or replacement costs of the commodity plus the overhead cost and other costs of the vendor doing business."[28]

28. *Hearings Before A Subcommittee of the House Committee on Interstate and Foreign Commerce*, 84th Cong., 2nd sess., at 6 (1960).

Although these definitions made the bill far more certain than the present statute as construed by the Government would be, the Department of Justice nevertheless objected to them as "vague and uncertain." It criticized the references to state law in part on the ground that it would be difficult to determine which law would apply, the point to the criticism being that different states define cost differently. It criticized the definitions quoted above as follows:

> "The definitions to be applicable in the absence of State law would also present problems, particularly with respect to the meaning of the word 'cost.' The cost of manufacturing, of packaging, of selling, not to mention overhead cost, are all imprecise terms as to the meaning of which there will no doubt be disagreement." (Hearings 7)

The Department added that these bills would "carry over many of the ambiguities inherent in the present language of section 3 of the Robinson-Patman Act and would add to them other difficulties and uncertainties . . ." (*Id.* at 7)

The Federal Trade Commission also opposed the bill for similar reasons. It found that the above-quoted definition was "too general and leaves unanswered many questions." (*Id.* at 4) It added that state laws vary in their definitions of cost, and consequently, "what would be lawful with respect to sales into one State would violate Federal law with respect to sales into another." (*Ibid.*)

There are about 30 states having laws of general applicability imposing certain prohibitions upon sales below cost under defined and qualified circumstances, and others

which have laws relating to specific commodities. (2 Trade Reg. Rep. par. 6571, *et seq.*) Practically all of these laws define "cost," detail the elements which must be included in the determination of cost and provide some basis for determining cost. (Id. at par. 6691) Thus, virtually all the legislatures recognized a need to clarify the "cost" concept. Nevertheless, the variation in these detailed provisions is itself eloquent evidence of the difficulty of deciding what "cost" is. A majority of the statutes do not stop with definitions but seek further to reduce uncertainty by specifying an arbitrary percentage markup to be added to the cost of goods of wholesalers and retailers. This markup is an arbitrary legislative determination of what will be considered the defendant's cost of doing business unless the defendant can show that his actual costs were lower. It is interesting to note that there is even great variation from state to state in these statutory percentages. Different statutes provide for 2%, 4%, 5%, 6%, 7%, 8% and even 12% (Id. at par. 6709), showing basic disagreement as to what a reasonable allowance or average for costs of doing business should be.

Despite their detailed definitions some of the state statutes have encountered constitutional difficulty on grounds of vagueness and uncertainty. (*Id.* at par. 6629) No state statute which fails to define cost has been upheld against an attack for vagueness, so far as we have been able to determine. The Supreme Court of Kansas recently invalidated under the Federal and State constitutions provisions of a statute governing sales of milk which made it unlawful to sell milk "for less than cost to the wholesaler, processor or distributor at the point of delivery." *State v.*

Fleming Co., 184 Kan. 674, 339 P. 2d 12 (1959). The court declared this provision unconstitutionally vague partly because it contained no definition of cost, stating:

> "It is argued that in this day and age, every-one in business has the services of accountants, but it will be seen that the statute leaves unanswered the question of whether the cost is to be determined as of a particular shipment or based upon business for a week, a month, six months or a year. The statute is totally silent as to what expenses are to be included in arriving at the cost at the point of delivery." (184 Kan. at 681, 339 P. 2d at 17)

There, the state argued, as the Government does here, that the defendant would know his own costs and could therefor comply with the statute. The court did not accept this oversimplification, stating:

> "The appellant would read the statute to simply provide that the appellees should keep books in good faith. But we cannot feel that the interpretation of the statute is so simple." (*Ibid*)

The Federal Trade Commission, which the Government brief claims "has experienced no great difficulty in assessing the evidence and upholding charges of sales below cost" (G.B. 23) actually regards determination of cost as an extremely complicated matter and believes that even a civil provision prohibiting sales below cost which the Commission would administer should have a highly detailed definition of cost. It proposed to the House Committee, *supra*, a spe-

cific definition of cost, which is set forth in the footnote.[29] Comparison of this definition with the completely undefined concept of "cost" offered by the Government in this case highlights the glaring deficiencies in the proposed approach.[30]

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29. "... the term 'cost' means the respective seller's cost and not an average cost in the industry whether such average cost be determined by an industry cost survey or some other method. It consists of the total outlay or expenditure by the seller in the acquisition, production, and distribution of the products involved, and comprises all elements of cost such as labor, material, depreciation, taxes (except taxes or net income and such other taxes as are not properly applicable to cost), and general overhead expenses, incurred by the seller in the acquisition, manufacture, processing, preparation for marketing, sale, and delivery of the products. Not to be included are dividends or interest on borrowed or invested capital, or nonoperating losses, such as fire losses and losses from the sale or exchange of capital assets. Operating cost should not be reduced by items of nonoperating income, such as income from investments, and gain on the sale of capital assets." *Hearings Before a Subcommittee of the House Committee on Interstate and Foreign Commerce on H.R.* 10235, 86th Cong., 2d Sess. 4-5 (1960).

30. Holdings of the Federal Trade Commission in cases arising under Section 5 of the Federal Trade Commission Act, cited in the Government brief (23) have no relevance here. (*E. B. Muller & Co. v. Federal Trade Commission*, 142 F.2d 511 (6th Cir. (1944); *Blackwell Journal Pub. Co.*, 23. F.T.C. 413 (1936); *Lock Joint Pipe Co.*, 27 F.T.C. 709 (1938).) Under its jurisdiction to fill in the meaning of Section 5's prohibition of "unfair methods of competition" the Commission exercises a quasi-legislative discretion which a court in a criminal case cannot exercise. The Commission acts with an expertise comparable to that of regulatory agencies which rule upon issues of reasonable rates in regulated industries, and its orders have only prospective effect.

There are still further difficulties with using "sale below cost" as a test of "unreasonably low prices." Even if there were complete agreement upon whose costs will govern, and what costs should be included, there would remain the complex problems of computing the relevant costs and of allocating indirect and joint costs to particular sales of particular products. The difficulties of making determinations of this kind have been revealed by cost justification proceedings under Section 2(a) of the Act. These difficulties prompted the Court to advert to "the intricacies inherent in the attempt to show costs" in such proceedings and to the "elusiveness of cost data, which apparently cannot be obtained from ordinary business records . . ." *Automatic Canteen Co. v. Federal Trade Commission*, 346 U.S. 61, 68 (1953).

The cost justification proviso of Section 2(a) defines the costs which are relevant to a determination and is therefore more definite than the undefined standard offered here. (See Appendix to this brief.) Further, the proviso operates only after the respondent has committed a prima facie violation and is thus on notice of possible illegality. The proviso operates only in civil, and not in criminal, situations. Even so, it has proved to be extremely difficult to apply. In 1956 the Federal Trade Commission's Advisory Committee on Cost Justification confirmed these difficulties. The Committee directly contradicts the Government's contention here that it is a simple matter for defendants to produce the rele-

vant cost information from their own records.[31] As the Committee stated: "It has not been customary for business enterprises to calculate and record the costs of commodities and distribution services in the detail required for a Robinson-Patman Act determination."[32] The Committee completely rejected any assumption that product costs can be readily determined in accordance with "scientific" cost accounting procedures. It stated:

> "Cost accounting is not and can never become an exact science because of the inherent element of judgment. Despite the prescription of uniform and detailed cost accounting procedures, two equally competent cost accountants may obtain different results from the same data. For this reason all cost accounting and cost analysis results should be accepted as reasonable approaches to accuracy, and not as precise measurements. The fact

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31. Few agencies have had more experience with the relation of costs to prices than the Office of Price Administration in World War II. In 1946, Congress was considering a proposal that prices fixed by OPA should provide for total costs plus a reasonable margin of profit. The Deputy Administrator for Accounting of OPA, Paul M. Green, reported to the Banking and Currency Committee of the House of Representatives that probably 85% of all industrial companies do not allocate cost information on a product basis, and hence could not produce cost information needed to determine prices on a cost basis. Later, this estimate was more than confirmed by a survey of 187,370 companies. EDWARDS, PRICE DISCRIMINATION 592-93, n. 18 (The Brookings Institution, 1959).

32. ADVISORY COMMITTEE ON COST JUSTIFICATION, REPORT TO THE FEDERAL TRADE COMMISSION 10 (1956); CCH, COST JUSTIFICATION REPORT, TEXT OF REPORT TO THE FEDERAL TRADE COMMISSION BY THE ADVISORY COMMITTEE ON COST JUSTIFICATION 14 (no date).

> that unit costs are frequently stated in mathematical terms, after elaborate and painstaking calculations, gives them an aura of precision that is not warranted. With few exceptions, every unit cost and every cost difference is subject to some plus or minus allowance. This fact is universally recognized for managerial purposes and should be for purposes of the Robinson-Patman Act. Most of the difficulties of proof stem from the fact that cost differences at best include elements of opinion and approximation." (ADVISORY COMMITTEE at 6, CCH at 10, *op. cit. supra* n. 32)

These authoritative characterizations of the difficulties of determining the unit costs of particular products are confirmed by Professor Corwin Edwards, former chief economist of the Federal Trade Commission. In his book on price discrimination[33] he points out that individual sellers frequently market a number of commodities, and that when the cost of one of these products comes into question, it becomes necessary to segregate the costs applicable to that product from the costs applicable to the others. This is an extremely difficult thing to do. The problem would arise under the present indictment, which covers a number of different products expressly lumped together under the term "milk," including not only whole milk and cream in their various forms but also "by-products such as cottage cheese

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33. EDWARDS, PRICE DISCRIMINATION 591 (The Brookings Institution, 1959).

and sour cream." (R 2)[34]

Moreover, as Professor Edwards points out, the further difficult problem arises of allocating responsibility for various costs of doing business to particular products. There are, he states, "often several plausible ways in which that responsibility can be determined, each differing from the other in the resulting computation of costs."[35] Further, he discusses the inherent limitations on the ability of sellers to price their products in terms of cost because of uncertainties as to the volume which will be sold, the efficiencies which will be achieved by different production levels and the other inherent obstacles to knowing one's costs in advance.

These demonstrations of the inherent difficulty of using cost as a standard for price in the relatively narrow and defined area of cost justification are all the more pertinent to the totally undefined standard of cost offered by the Government as an absolute test of the legality of prices.

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34. As Walter H. Hamilton said shortly after enactment of the Robinson-Patman Act: "No accountant has been able to devise a method yielding by-product or joint-cost figures which does not embody a dominance of arbitrariness and guesswork." Hamilton, *Cost As A Standard for Price*, 4 LAW AND CONTEMP. PROB. 321, 323 (1937). A well recognized authority in the accounting field suggests four ordinary methods of accounting for by-products, each of which yields a different result and three of which involve attributing no cost at all to the by-products. WIXON, ACCOUNTANT'S HANDBOOK §6-72 (Ronald, 4th ed., 1961). Acceptable methods of attributing costs to joint products include allocation of costs on the basis of (1) relative market *price*, (2) proportionate volume of common material, (3) a survey "whereby common costs are allocated to joint products *arbitrarily* after consideration of a number of important factors. . . ." (*Id.* §6-71, emphasis added)

35. EDWARDS, *op. cit. supra* note 33, 596-97.

The difficulties are borne out by careful analyses of experience under the state sales-below-cost statutes, which led one writer to conclude that "'cost' as a criterion of price in these statutes is largely a fiction,"[36] and another that it is an economic fallacy.[37]

The Government is thus grossly in error when it asserts that determination of whether defendants have sold below cost is "easily within the competence of judge and jury." The same error undermines the opinion in *F & A Ice Cream Co. v. Arden Farms Co.*, 98 F. Supp. 180, 189 (S.D. Cal. 1951) (quoted in G.B. 22). The district judge, whose authorization in the same case of private suits under Section 3 has since been invalidated by this Court's holding in the *Nashville* case,[38] voiced the erronous impression that "cost accountancy has reached the exactness of a science." (*Id.* at 189)

Other efforts of the Government brief to establish secondarily that individual product costs are easy to ascertain are equally unavailing. The mere fact that one defendant has pleaded guilty to an "unreasonably low prices indictment" (G.B. 23) and a few have consented to civil Sherman Act or Federal Trade Commission Act decrees containing provisions on selling below cost or at unreasonably low prices obviously does not prove that these terms possess constitutional certainty. It merely shows that some defendants

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36. Clark, *Statutory Restrictions on Selling Below Cost*, 11 VAND. L. REV. 105, 123 (1957).

37. Lovell, *Sales Below Cost Prohibitions: Private Price Fixing Under State Law*, 57 YALE L. J. 391, 396 (1948).

38. *Balian Ice Cream Co. v. Arden Farms Co.*, 94 F. Supp. 796 (S.D.Cal. 1950).

were willing to settle on such terms for reasons which are unknown, but probably in the face of possibly worse alternatives.

The assertion that the Canadian Restrictive Trade Practice Commission has "displayed no difficulty in assessing evidence of costs" in investigating allegations of unreasonably low prices (G.B. 23, note 8) is completely refuted by examination of the Report cited by the Government, a "Report Concerning the Wholesale Trade in Cigarettes and Confectionery in the Edmonton District" (1958). The Report dealt with investigation of charges that certain grocery wholesalers were selling cigarettes and chocolate at unreasonably low prices. The Report obviously experienced great difficulty because of the varying costs of low-price general line wholesalers as compared with those of higher-priced tobacco and confectionery wholesalers. The Report did not even attempt to ascertain individual product costs, and it stated that "it would not be feasible for wholesale grocers to attempt to determine the cost of distribution for individual items . . ." (*Id.* at 54). The wholesalers being investigated were exonerated as a result of estimates by the Commission as to average costs, togther with conclusions that the low prices were motivated by good business reasons. The Report is an excellent example of why questions of this kind cannot be committed to courts and juries in criminal cases, but must be left to the discretion and judgment of administrative bodies.

The great difficulties involved in using cost as a standard for price are demonstrated by a case cited in the Government brief (p. 10), *Ben Hur Coal Co. v. Wells*, 242 F.2d

481 (10th Cir. 1957). The case was a private suit under Section 3 alleging sales of coal at unreasonably low prices. The plaintiff contended that the defendant had sold below cost, and the defendant contested this. The court reviewed the theories and accounting demonstrations of both sides at some length, and avoided the issue by disposing of the case, not upon a cost basis, but upon a finding that the defendant's pricing policy was based upon good business reasons. The court stated that "in the final analysis, the question resolves itself into one of intent and purpose, not a choice of accounting methods" (*Id.* at 486).

It would seem beyond dispute that a standard of sales below cost should not be adopted for criminal prosecutions without carefully predetermined specific definitions. Otherwise, defendants may be subjected to a completely unconstitutional lack of due process. Accordingly, even if the Government's attempted reconstruction of the unreasonably low prices clause were adopted, the indictment would not rest upon a sound constitutional foundation.

CONCLUSION

It is therefore submitted that the decision of the district court dismissing the Robinson-Patman Act counts of the indictment on constitutional grounds was entirely correct and should be affirmed.

Respectfully submitted,

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Dated: February 8, 1962

APPENDIX

This appendix sets forth the full texts of Sections 1 and 3 of the Robinson-Patman Act (49 Stat. 1526-1528) as they appear in the United States Code (15 U.S.C. §13, 13a).

SECTION 1

Section 1 of the Robinson-Patman Act, known as Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, is as follows:

"§ 13. Discrimination in price, services, or facilities.
(a) Price; selection of customers.

It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing contained in Sections 12, 13, 14-21, and 22-27 of this title shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, how-*

ever, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further*, That nothing contained in said sections shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further*, That nothing contained in said sections shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

"(b) Burden of rebutting prima-facie case of discrimination.

Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Com-

mission is authorized to issue an order terminating the discrimination: *Provided, however*, That nothing contained in Sections 12, 13, 14-21, and 22-27 of this title shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

"(c) **Payment or acceptance of commission, brokerage or other compensation.**

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control of, any party to such transaction other than the person by whom such compensation is so granted or paid.

"(d) **Payment for services or facilities for processing or sale.**

It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with

the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

"(e) **Furnishing services or facilities for processing, handling, etc.**

It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

"(f) **Knowingly inducing or receiving discriminatory price.**

It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section. Oct. 15, 1914, c. 323, §2, 38 Stat. 730; June 19, 1936, c. 592, §1, 49 Stat. 1526."

SECTION 3

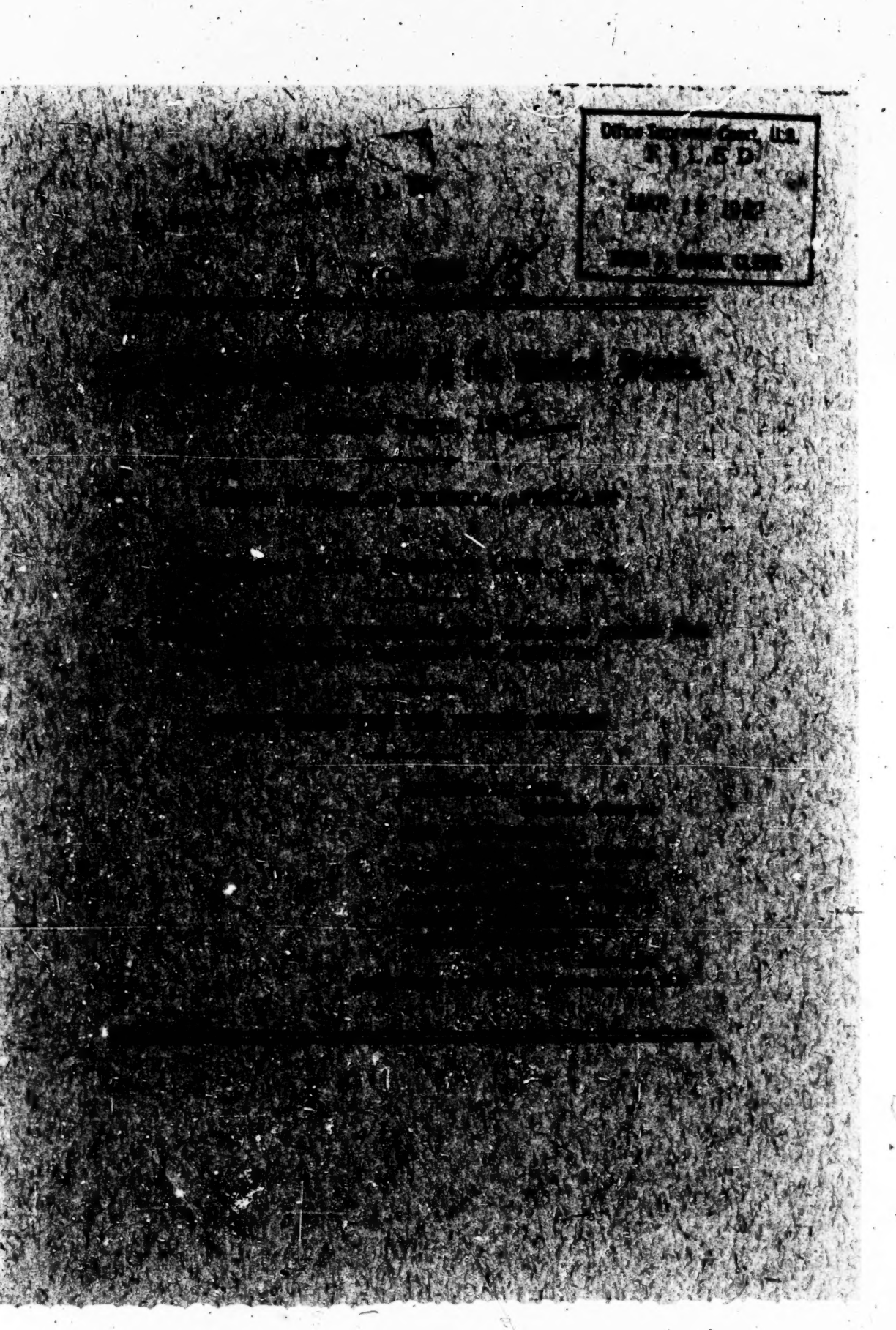
Section 3 of the Robinson-Patman Act is as follows:

"13a. **Discrimination in rebates, discounts, or advertising service charges; underselling in particular localities; penalties.**

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party

to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than $5,000 or imprisoned not more than one year, or both."


Office Supreme Court, U.S.
FILED
APR 14 1982

INDEX

CITATIONS

Cases: Page

Bandini Petroleum Co. v. Superior Court, 284 U.S. 8 7

Blackwood v. United States, 138 F. 2d 461 4

Braatelien v. United States, 147 F. 2d 888 5

Bryan v. United States, 175 F. 2d 223 5

Land v. United States, 177 F. 2d 346 5

McCoy v. United States, 169 F. 2d 776, certiorari denied, 335 U.S. 898 4

Moore v. Mead's Fine Bread, 348 U.S. 115 9

Rescue Army v. Municipal Court, 331 U.S. 549 7

Stirone v. United States, 361 U.S. 212 5

United States v. Alford, 274 U.S. 264 7

United States v. Evans, 333 U.S. 483 7

United States v. Five Gambling Devices, 346 U.S. 441 7

United States v. Glasser, 116 F. 2d 690, modified, 315 U.S. 60 5

United States v. Halseth, 342 U.S. 277 5

United States v. Harriss, 347 U.S. 612 8

United States v. Kahriger, 345 U.S. 22 7

United States v. Lem Hoy, 330 U.S. 274 5

United States v. Minneapolis Elec. Contractors' Ass'n., 99 F. Supp. 75 3

United States v. Neff, 212 F. 2d 297 5

United States v. Shindler, 173 F. Supp. 393 4

United States v. Spector, 343 U.S. 169 7

United States v. Wurzbach, 280 U.S. 396 6

Williams v. United States, 341 U.S. 97 6

Statutes and Rules:

Federal Rules of Criminal Procedure, Rule 7(c) 3

Robinson-Patman Act, Section 3, 49 Stat. 1526, 15 U.S.C. 13a 1, 5, 8, 9, 10

632801—62

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 173

UNITED STATES OF AMERICA, APPELLANT

v.

NATIONAL DAIRY PRODUCTS CORP., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

REPLY BRIEF FOR THE UNITED STATES

Most of appellees' contentions have already been fully answered in our main brief. A few of their arguments, however, call for a short reply.

1. Appellees challenge our contention that the constitutionality of the prohibition in Section 3 of the Robinson-Patman Act against selling at unreasonably low prices for the purpose of destroying competition is to be determined on the basis of the predatory sales charged in this indictment, namely, sales below cost with the loss absorbed by the profits on other activities of a nationwide business. Appellees argue (Br. 5–16) that the offenses charged in the indictment are not limited to sales below cost; and that,

in any event, the issue is the constitutionality of the statute "on its face" (Br. 9). Neither contention is sound.

a. Each of the seven counts charging violation of the Robinson-Patman Act sets forth the offense in two paragraphs under the single heading: "Offense Charged—Robinson-Patman Act." Count Two (R. 8–9) is typical. Under the foregoing heading, paragraph 22 alleges that National sold milk to its distributors in the Paola-Osawatomie, Kansas, market "at unreasonably low prices for the purpose of destroying competition" in that market, "in violation of Section 3 of the Act of Congress * * * commonly known as the Robinson-Patman Act." This clause is in the language of the statute. Paragraph 23 alleges that, "[p]ursuant to and in effectuation of the offense charged in paragraph 22 of this indictment, National utilized the advantages it possesses by reason of the fact that it operates in a great many different geographical localities in order to finance and subsidize a price war against small dairies selling milk in competition with it and its distributor in the Paola-Osawatomie, Kansas market *by intentionally selling milk to its distributor Martin at prices below National's cost*" (emphasis added). Paragraph 24, under the heading "Effects," states that the "effects *of the aforesaid offense*, among others, have been to cause severe financial losses to small dairies doing business" in that market, and "to cause such dairies to suffer losses in sales volume" (emphasis added).

The particularization of the offense set forth in paragraph 23 plainly limits and qualifies the broader language of paragraph 22. Paragraph 23 makes it explicit that the sales at "unreasonably low prices" charged in this indictment are sales "at prices below National's cost." It is the two paragraphs together, the second limiting the first, that set forth the offense charged in Count Two. "[T]he indictment must be read as a whole, not by sentences." *United States* v. *Minneapolis Elec. Contractors' Ass'n*, 99 F. Supp. 75, 78 (D. Minn.). The charging portion of the count explicitly sets forth the "Offense Charged" in two paragraphs under that heading, and not just in the statutory language used in the first paragraph. The "Effects" paragraph of the count, which immediately follows the two paragraphs setting forth the "Offense Charged," plainly refers to those two preceding paragraphs when it speaks of the effects of the "aforesaid offense." The two paragraphs of the charging portion of the count thus constitute the "plain, concise and definite written statement of the essential facts constituting the offense charged," which Rule 7(c) of the Federal Rules of Criminal Procedure requires the indictment to contain.[1]

---

[1] Contrary to appellees' contention (Br. 8-9), government counsel did not state to the district court that "the indictment has a broader scope than below-cost sales." The colloquy upon which appellees rely, during which government counsel stated that an unreasonably low price "does not have to be below cost" (R. 115), related to the general scope of the statute, and not to the offense charged in this particular indictment. Indeed, appellees' counsel himself previously had recognized that "one argument that the Government makes is, certainly it is an unreasonably low price where a defendant charged under Section 3 sells below cost" (R. 95).

This interpretation of the indictment is in accord with the rule that when various acts are alleged in a single count, "all of its recitations and averments must therefore be read and considered together." *Blackwood* v. *United States*, 138 F. 2d 461, 463 (C.A. 8); see, also, *McCoy* v. *United States*, 169 F. 2d 776, 780 (C.A. 9), certiorari denied, 335 U.S. 898; *United States* v. *Shindler*, 173 F. Supp. 393, 395 (S.D. N.Y.). In the *Shindler* case, Count Two of the indictment charged a violation of Section 17(a)(2) of the Securities Act of 1933, "first, in the language of the statute [the defendant 'did unlawfully * * * obtain money * * * by means of an omission to state a material fact necessary to make the statements made, in the light of the circumstances under which they were made, not misleading'], and then by particularizing the acts complained of [having called the attention of the purchasers of stock to the price at which it was selling on the American Stock Exchange, 'but having omitted to state the material fact that said price of said stock had been caused to rise and had been prevented from falling by the said defendants * * *']." In refusing to dismiss this count, the court stated (p. 395, emphasis added): "By going beyond the statutory language with greater specificity the defendants are more fully informed of the crime charged, enabling them thereby to prepare their defense to meet the prosecution's case, and at the same time protected against double jeopardy. *The parts of the count must be read together.*"

Appellees' argument implicitly assumes that the government will not be limited at trial to proof of the acts specified in the second paragraph of each of the Robinson-Patman Act counts. Yet such a limitation would clearly be imposed if the specifications had been contained in a bill of particulars. *E.g.*, *United States* v. *Neff*, 212 F. 2d 297, 309 (C.A. 3); *Land* v. *United States*, 177 F. 2d 346, 349 (C.A. 4); *Brijan* v. *United States*, 175 F. 2d 223, 224 (C.A. 5); *Braatelien* v. *United States*, 147 F. 2d 888, 892 (C.A. 8); *United States* v. *Glasser*, 116 F. 2d 690, 702 (C.A. 7), modified on other grounds, 315 U.S. 60.[a] *A fortiori*, when the indictment itself particularizes the acts alleged to violate the statute, appellees can be convicted only if the specific acts charged are proven. Cf. *Stirone* v. *United States*, 361 U.S. 212.

b. The contention that the constitutionality of Section 3 must be determined "on its face" (Br. 9–16), rather than "as applied" in this particular case, is but another way of arguing that the statute should be invalidated if hypothetical situations can be imagined to which its application may pose serious constitutional problems. The Court, of course, necessarily looks to the "face" of the statute in deciding the constitutional issue, in the sense that it must first ascertain what the statute does, to whom it applies, and what standards it provides. Thus, in the

[a] For the purposes of the Criminal Appeals Act, the particulars are to be considered as limiting the indictment, unless the district court has not so treated them. See *United States* v. *Lem Hoy*, 330 U.S. 724, 725, 730; *United States* v. *Halseth*, 342 U.S. 277, 278–279.

present case the Court will have to determine whether the statutory language applies to the conduct charged in the indictment, *i.e.*, whether the sales below cost for the purpose of destroying competition are covered by the statutory prohibition on selling at unreasonably low prices for that purpose.

But legal issues are not decided in a vacuum. In the delicate field of constitutional adjudication, this Court consistently has refused to reach beyond the particular case before it and to strike down a federal statute on the basis of its conjectural application to other situations. See our main brief, pp. 32–35; *Williams* v. *United States*, 341 U.S. 97, 101; *United States* v. *Wurzbach*, 280 U.S. 396, 399. The principle is equally applicable whether the Court is called upon to decide the constitutional issue on direct appeal under the Criminal Appeals Act from a dismissal of an indictment, or upon review of a conviction. For the primary purpose of the rule requiring definiteness in criminal statutes is to give adequate warning of what conduct is prohibited, and this purpose is satisfied, as to a particular defendant, when he is adequately informed by the statute that his conduct is prohibited thereby.

The cases upon which appellees rely (Br. 11–14) do not require a contrary conclusion. In most of them where the Court decided the constitutional question "on the face" of the statute, the indictment itself was drawn in the statutory terms, and the con-

stitutional issue posed was thus as broad as the statute itself.[2] In other instances, the issue of vagueness would be the same no matter to what facts the statute were applied.[3] In none of them, however, did the Court reach out to strike down, on the basis of its possible applicability to other facts, a statute which, as applied to the particular offense before it, was not indefinitely vague.

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[2] *United States* v. *Kahriger*, 345 U.S. 22 (No. 167, O.T. 1952, R. 2); *United States* v. *Spector*, 343 U.S. 169 (No. 443, O.T. 1951, R. 2); *United States* v. *Alford*, 274 U.S. 264 (No. 983, O.T. 1926, R. 2, other than the ambiguous first count); *United States* v. *Evans*, 333 U.S. 483 (No. 15, O.T. 1947, R. 1).

[3] In *United States* v. *Five Gambling Devices*, 346 U.S. 441, the statute required dealers in gambling devices to register with the Attorney General the address of their principal place of business and of their place of business "in such district." The quoted words were not defined, and were apparently left in the bill through oversight. In considering whether this provision was unconstitutionally vague, the facts of the specific case were immaterial and there was no distinction between judging the statute on its face or viewing it as applied. Similarly, in *Bandini Petroleum Co.* v. *Superior Court*, 284 U.S. 8, which sustained a petroleum conservation statute prohibiting "unreasonable waste", the statute was examined on its face because the proceeding was for a writ of prohibition against its enforcement. The issue was whether the statute conferred jurisdiction on the lower court to entertain any enforcement action whatever, without regard to whether a particular defendant had been denied his right to a fair warning. (See 284 U.S. at 15–16.) Contrary to appellees' contention (Br. 12, n. 3), the "well-settled" ruling of *Bandini* which this Court cited in *Rescue Army* v. *Municipal Court*, 331 U.S. 549, was that a judgment denying a writ of prohibition was final for appeal purposes notwithstanding that enforcement proceedings might follow; the rule was not related to the question in the instant case.

c. In urging the Court to decide only whether Section 3 is constitutional as applied to the sales below cost charged in this indictment, we are not suggesting that, if the constitutional issue were to be decided on the broader basis of the "face" of the statute, the statute would be invalid. On the contrary, we believe that the arguments we have made in our main brief to show that the statute is constitutional as here applied are equally applicable to uphold its constitutionality on its face. See *United States* v. *Harriss*, 347 U.S. 612, 618. We press the argument, however, because we believe that sound judicial administration strongly counsels against the decision of hypothetical constitutional questions that are in fact not presented by the actual case before the Court.

2. Appellees argue (Br. 19–20, 40–42, 55–57) that in our main brief we improperly relied upon the legislative history of the geographical price discrimination clause of Section 3 to show Congressional intent to prohibit sales below cost in the unreasonably low prices clause of that section. Both clauses, however, are designed to prevent the same kind of illegal action, namely, predatory pricing practices for the purpose of destroying competition or eliminating a competitor. They differ only in that they condemn different means to achieve this illegal objective. The one prohibits sales in one part of the country "at prices lower than exacted by said persons elsewhere in the United States"; the other, which is involved in this case, prohibits sales at "unreasonably low prices." But successful selling below cost can be

accomplished over an extended period only if the seller has other profitable markets or product lines in which it can recoup its losses; in the present case, the indictment charges that National "utilized the advantages it possesses by reason of the fact that it operates in a great many different geographical localities in order to finance and subsidize a price war against small dairies selling milk in competition with it and its distributor" in certain local markets (R. 9, 12, 15, 19, 22, 29, 32). The use of such predatory price cutting by large firms as a means of destroying competition has long been recognized by the courts and Congress. See *Moore* v. *Mead's Fine Bread*, 348 U.S. 115, 119–120, and our main brief, pp. 12–17. Since both clauses of Section 3 are designed to achieve the same basic purpose, their legislative histories may be considered together to show Congressional concern with below-cost sales in Section 3.

3. Finally, appellees contend (Br. 58–71) that, even as applied to the sales below cost charged in this indictment, Section 3 would still be unconstitutional, since "below cost" is itself a "Vague and Indefinite Standard" (Br. 58). While there may be problems of defining cost in other contexts, the indictmen in this case charges National with "*intentionally* selling milk to its distributor * * * at prices below National's cost" (*e.g.*, R. 9, emphasis added). In other words, this indictment charges National with willfully and knowingly selling below cost. If National's own books show, under whatever cost accounting system the company follows, that it sold

below cost, or if there is evidence that National's officials admitted selling below cost, plainly appellees could not complain that they did not have adequate warning that they sold intentionally below cost within the meaning of the indictment and in violation of the statute. If appellees are uncertain as to what the indictment means in charging them with intentionally selling below cost, they can seek additional information through a bill of particulars.

4. The basic fallacy in appellees' argument is that they would have the Court decide this case as if it were a scholastic exercise in etymology and cost accounting. Section 3 must be read in the context of our historical and continuing antitrust policy—a policy of preventing the destruction of competition and the growth of monopoly. The words, especially words like "unreasonable," take meaning from the context. Beginning with the Clayton Act of 1914, later in the Robinson-Patman Act and again in the Celler-Kefauver amendment to Section 7, Congress sought to halt restraints of trade in their incipiency, especially by outlawing those specific tactics which the dominant firms in a market may use to suppress their competitors. Sales below cost (*i.e.*, at less than the seller's own cost) *for the purpose of destroying competition or eliminating a competitor* have been recognized as undesirable predatory practices since before the Sherman Act was enacted. It is entirely plain that Section 3 makes this practice unlawful *per se* without requiring the government to prove that there

has been a conspiracy in unreasonable restraint of trade or that a monopoly has developed.

CONCLUSION

For the foregoing reasons, and those set forth in our main brief, the judgment of the district court dismissing counts 2, 4, 6, 8, 10, 13, and 15 of the indictment should be reversed.

Respectfully submitted.

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INDEX

	Page
Opinion below	1
Jurisdiction	2
Statute involved	2
Question presented	3
Statement	3
Summary of argument	6
Argument:	
I. Section 3 prohibits sales made with predatory intent at prices so low as to lack a rational foundation in the seller's costs, market conditions, business prospects or exigencies, or other circumstances facing the seller of a kind that an ordinary businessman in the seller's position, but without predatory intent, would take into consideration	11
A. Background and purpose of Section 3	12
B. Analysis of Section 3	18
II. Section 3, as thus construed, is sufficiently definite and certain to satisfy the requirements of the Fifth Amendment, at least as applied to sales below the seller's own costs as charged in the indictment	22
A. The meaning of a statute may be ascertained by reference to its history and context	25

654954—62——1

Argument—Continued
II. Section 3, etc.—Continued
B. A statute may constitutionally incorporate by reference a business standard familiar to persons affected by the legislation and readily ascertainable by judge and jury 26
C. The business practices and standards taken up by Section 3 are sufficiently ascertainable and definite, at least applied as to sales below costs, to satisfy the requirements of the Fifth Amendment 30
III. Since Section 3 is constitutional as applied to the sales below cost charged in the indictment, there is no occasion to consider its constitutionality as applied to other situations 43
Conclusion 52

CITATIONS

Cases:

Alabama State Federation of Labor v. *McAdory*, 325 U.S. 450 44
American Tel. & Tel. Co. v. *United States*, 299 U.S. 232 ..... 9, 25, 33
American Tobacco Co. v. *United States*, 328 U.S. 781 13
Bandini Petroleum Co. v. *Superior Court*, 284 U.S. 8 ..... 27, 33
Barrows v. *Jackson*, 346 U.S. 249 44
Ben Hur Coal Co. v. *Wells*, 242 F. 2d 481 38
Blackwood v. *United States*, 138 F. 2d 461 46
Boyce Motor Lines, Inc. v. *United States*, 342 U.S. 337 ..... 22, 23, 27, 42
Braatelien v. *United States*, 147 F. 2d 888 48

Cases—Continued

	Page
Bryan v. *United States*, 147 F. 2d 888	48
Champlin Refining Co. v. *Corporation Commission*, 286 U.S. 210	48
Cline v. *Frink Dairy Co.*, 274 U.S. 445	34
Connally v. *General Construction Co.*, 269 U.S. 385	35, 36, 37
F. & A. Ice Cream Co. v. *Arden Farms Co.*, 98 F. Supp. 180	31, 40
Federal Trade Commission v. *Anheuser-Busch, Inc.*, 363 U.S. 536	15
Hague v. *C.I.O.*, 307 U.S. 496	50
Hygrade Provision Co. v. *Sherman*, 266 U.S. 497	23
International Harvester Co. v. *Kentucky*, 234 U.S. 216	33, 34
Jordan v. *DeGeorge*, 341 U.S. 223	27
Land v. *United States*, 177 F. 2d 346	47
Lanzetta v. *New Jersey*, 306 U.S. 451	48, 50
Lovell v. *Griffin*, 303 U.S. 444	50
McCoy v. *United States*, 169 F. 2d 776, certiorari denied, 335 U.S. 898	46
McGowan v. *Maryland*, 366 U.S. 420	28
Miller v. *Oregon*, 273 U.S. 657	33
Moore v. *Mead's Fine Bread Co.*, 348 U.S. 115	15
Nash v. *United States*, 229 U.S. 373	8, 25, 32, 34, 37
Porto Rican American Tobacco Co. v. *American Tobacco Co.*, 30 F. 2d 234	13
Ratner v. *California*, 321 U.S. 755	9, 27, 33
Robinson v. *United States*, 324 U.S. 282	44, 49
Small Co. v. *American Sugar Refining Co.*, 267 U.S. 233	8, 29, 33
Sproles v. *Binford*, 286 U.S. 374	9, 21, 22, 28, 33
Standard Oil Co. v. *United States*, 221 U.S. 1	13
Stirone v. *United States*, 361 U.S. 212	48
Thornhill v. *Alabama*, 310 U.S. 88	50

Cases—Continued

	Page
United Public Workers v. *Mitchell*, 330 U.S. 75	44
United States v. *American Tobacco Co.*, 221 U.S. 106	13
United States v. *Borden Co.*, 308 U.S. 188	51
United States v. *Cohen Grocery Co.*, 255 U.S. 81	28, 33
United States v. *Corn Products Refining Co.*, 234 Fed. 964	13, 39
United States v. *Fruehauf*, 365 U.S. 146	44
United States v. *Glasser*, 116 F. 2d 690, modified, 315 U.S. 60	48
United States v. *Halseth*, 342 U.S. 277	48
United States v. *Harriss*, 347 U.S. 612	26, 44
United States v. *Leiner*, 143 F. 2d 298	33
United States v. *Lem Hoy*, 330 U.S. 724	48
United States v. *Minneapolis Electrical Contractors' Ass'n*, 99 F. Supp. 75	46
United States v. *Neff*, 212 F. 2d 297	47
United States v. *Petrillo*, 332 U.S. 1	22, 38
United States v. *Ragen*, 314 U.S. 513	9, 22, 23, 27, 32, 43
United States v. *Raines*, 362 U.S. 17	44
United States v. *Shindler*, 173 F. Supp. 393	47
United States v. *Spector*, 343 U.S. 169	8, 25, 50
United States v. *Trenton Potteries Co.*, 273 U.S. 392	29
United States v. *Wise*, 370 U.S. 405	6
Winters v. *New York*, 333 U.S. 507	23

Constitution and Statutes:

U.S. Constitution:	
First Amendment	50
Fifth Amendment	9, 25, 37
Clayton Act, 38 Stat. 730, as amended, 15 U.S.C. 12, *et seq.*, Section 14	6
Criminal Appeals Act, 18 U.S.C. 3731	2, 51
Lever Anti-Profiteering Act, 40 Stat. 276, as amended	8, 28, 33

Constitution and Statutes—Continued

	Page
Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13, *et seq.*, Section 3	2, 3, 4, 6, 7, 10, 11, 12, 15, 16, 18, 19, 20, 22, 24, 30, 31, 35, 37, 38, 40, 41, 42, 43, 45, 51
Securities Act of 1933, 48 Stat. 74, as amended, 15 U.S.C. 77a *et seq.*, Section 17(a)(2)	47
Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1, *et seq.*	3, 6
Miscellaneous:	
Burns, *The Decline of Competition* (1936)	13
Clark, *Statutory Restrictions on Selling Below Cost*, 14 Vand. L. Rev. 165	41
80 Cong. Rec.:	
3112	16
3113	16
6332	16
6346	16
6348	17
9416	16
Edwards, *Maintaining Competition* (1949)	13
Federal Rules of Criminal Procedure, Rule 7(c)	46
Hale & Hale, *Market Power* (1969)	13
Hearings before a Subcommittee of the House Committee on Interstate & Foreign Commerce on H.R. 10235, 86th Cong., 2d Sess.	41
Hearings before a Subcommittee of the Committee on the Judiciary, United States Senate, on S. 4171, 74th Cong., 2d Sess.	7, 17
H. Rep. 627, 63d Cong., 1st Sess.	14
Machlup, *The Political Economy of Monopoly* (1952)	13
Restatement of Trusts, §§ 174, 227	21
Rowe, *Price Discrimination Under the Robinson-Patman Act* (1962)	13
S. 4171, 74th Cong., 2d Sess.	16
S. Rep. 1502, 74th Cong., 2d Sess.	16
Thorelli, *The Federal Antitrust Policy* (1955)	13

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 18

UNITED STATES OF AMERICA, APPELLANT

v.

NATIONAL DAIRY PRODUCTS CORP., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

BRIEF FOR THE UNITED STATES ON REARGUMENT

The questions raised during the initial argument and the order for reargument suggest the need for a more complete exposition of the government's views upon some of the issues mooted on this appeal. Accordingly this brief is submitted in place of the original brief on the merits filed by the United States.

OPINION BELOW

The district court rendered no opinion in dismissing the counts of the indictment charging violations of Section 3 of the Robinson-Patman Act. The court's oral statement, made when it granted the motion to dismiss those counts, is set forth at R. 121–122.

JURISDICTION

The counts of the indictment involved in this appeal were filed under Section 3 of the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13a. The order of the district court, dismissing these counts as based on an unconstitutional statute, was entered on March 20, 1961 (R. 122–123). The notice of appeal was filed on April 15, 1961 (R. 124–125); and probable jurisdiction was noted on October 9, 1961 (R. 126; 368 U.S. 808). The jurisdiction of this Court rests on the Criminal Appeals Act, 18 U.S.C. 3731. The order setting the case for reargument at the 1962 term was entered on April 2, 1962. 369 U.S. 833.

STATUTE INVOLVED

Section 3 of the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13a, provides as follows:

> *Discrimination in rebates, discounts, or advertising service charges; underselling in particular localities; penalties*
>
> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said

person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than $5,000 or imprisoned not more than one year, or both.

QUESTION PRESENTED

Whether the provision of Section 3 of the Robinson-Patman Act making it a crime to sell goods at unreasonably low prices for the purpose of destroying competition, as applied to sales made below cost with such purpose, is unconstitutionally vague and indefinite.

STATEMENT

On September 16, 1959, the appellees were indicted in the United States District Court for the Western District of Missouri (R. 1–33). Eight counts (counts 1, 3, 5, 7, 9, 11, 12 and 14) charged National Dairy Products Corporation ("National") with conspiring to restrain trade in violation of Section 1 of the Sherman Act, 26 Stat. 209, 15 U.S.C. 1; seven counts (counts 2, 4, 6, 8, 10, 13 and 15) charged it with making sales below cost for the purpose of destroying competition, in violation of Section 3 of the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13a. Two of the Sherman Act counts (counts 11 and 12) and one of the Robinson-Patman Act counts (count

13) named Raymond J. Wise, a vice-president and director of National, as a codefendant.

The pertinent allegations of the indictment are as follows:

National is engaged in the business of purchasing, processing, distributing and selling milk and other dairy products throughout the United States (R. 1). For the past several years National, which has a milk processing plant in Kansas City, Missouri, has been in competition with national concerns and various small local dairies, both in the Greater Kansas City area and in a number of smaller cities and towns adjoining Kansas City in Kansas and Missouri (R. 4). Each of the local dairies has only a single bottling plant and, typically, annual sales not exceeding $300,000 (R. 4). A number of local dairies have sales of less than $100,000 and net assets of less than $50,000 (R. 4). Throughout the Greater Kansas City market, National distributes its products largely through its own employees, but in the cities and towns in Missouri and Kansas outside this market it usually sells its milk in paper cartons to independent distributors who, in turn, resell the milk on their own account (R. 4). During the period covered by the indictment, National did not normally bottle milk in glass containers for sale in stores (R. 4–5).

The indictment charged violations of Section 3 of the Robinson-Patman Act with respect to National's direct or indirect sales of milk in Kansas City and six local markets in Missouri or Kansas. It alleged that during stated periods National sold milk through its distributors (or, in the the case of the Greater

Kansas City market, directly) at unreasonably low prices for the purpose of destroying competition in the market in question (R. 9, 12, 15, 18–19, 22, 28–29, 32). In each market, National is charged with having "utilized the advantages it possesses by reason of the fact that it operates in a great many different geographical localities in order to finance and subsidize a price war against small dairies selling milk in competition with it * * * by intentionally selling milk [directly or to its distributor in the area] at prices below National's cost" (R. 10, 12, 15–16, 19, 22, 29, 32). The effect of such practices in two instances has been to "eliminate competition" and "to drive small dairies from" the market (R. 16, 32). In the other five areas, the actions of National have resulted in "severe financial losses to small dairies doing business" in the market and have caused them losses in sales volume (R. 9, 12, 19, 22, 29). In addition, the violations in the Greater Kansas City market (in which the defendant Wise participated as a principal (R. 28)), have forced some small dairies to request stores selling their products to refrain from advertising or selling them at low prices, in order to prevent National from starting a new price war (R. 29).[1]

[1] The Sherman Act counts charged violations relating to National's activities in the six specified local markets outside Greater Kansas City. It was alleged that in each case, during the same periods involved in the parallel Robinson-Patman Act counts, National's distributors were guaranteed a specific gross margin of profit, thus permitting the distributor to engage in price wars without risk of loss (see, *e.g.*, R. 7, 8); and that an objective and result of National's actions was to restrict or eliminate the sale of milk in glass gallon containers by the small dairies in these communities in competition with the milk sold by National or its distributors in paper cartons (*ibid.*).

On January 22, 1960, National moved to dismiss the seven Robinson-Patman Act counts on the ground that the statute is unconstitutionally vague; a similar motion was filed by the defendant Wise with respect to the Robinson-Patman Act count involving him. After hearing oral argument by the parties on March 6, 1961, the district court ruled from the bench that the statute "is so vague and indefinite as to violate the Constitutional provisions relating to due process" (R. 122), and dismissed counts 2, 4, 6, 8, 10, 13 and 15. The formal order of dismissal (R. 122–123) was entered on March 20, 1961.[2]

SUMMARY OF ARGUMENT

I

Section 3 of the Robinson-Patman Act forbids a business firm engaged in interstate commerce "to sell * * * goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor." In our view, a price is "unreasonably low" when, judged from the standpoint of the seller and according to the standards of the business community, it has no rational justification in existing or foreseeable business conditions other than the seller's desire to destroy competition or eliminate a competitor. A price which results in selling at a loss, accord-

[2] The district court subsequently dismissed counts 11 and 12 as to appellee Wise, on the ground that a corporate official may not be prosecuted under Section 1 of the Sherman Act for antitrust violations committed in his corporate capacity, but only under Section 14 of the Clayton Act. On appeal the judgment of dismissal was reversed, *United States* v. *Wise*, 370 U.S. 405.

ing to the seller's own methods of accounting, is unreasonably low by any normal business standard in the absence of some extraordinary, identifiable explanation.

That this is the meaning of the disputed phrase fairly and unambiguously appears from the words of Section 3, read in the light of its background and purpose. Antitrust history shows that this provision is an important part of the general body of antitrust law intended to preserve a competitive economy with opportunities for small businessmen. The provision is aimed at a well-known weapon of monopolists—predatory pricing—with a view to forbidding use of the monopolistic practice before competition has been further impaired. Although price discrimination is commonly associated with predatory pricing and is therefore the target of many related provisions of the Robinson-Patman Act, it is clear that the evil does not depend upon discrimination; and the words in question were intended to interdict it in the latter form. Thus, although the Senate hearings on the Borah-Van Nuys Bill were primarily concerned with discrimination, there was also testimony referring more broadly to sales at a loss made with the objective of destroying competition. *Hearings before a Subcommittee of the Committee on the Judiciary, United States Senate, on S. 4171*, 74th Cong., 2d Sess., pp. 85–86.

Since Section 3 is concerned with predatory tactics, not with assuring every seller a fair price, the "unreasonably low prices" are manifestly those which a rational business man would not set on his wares, hav-

ing in mind all the relevant factors that confront him; in other words, they are prices having no rational support in existing or foreseeable business conditions or other relevant considerations other than a predatory purpose. The question of reasonableness is to be answered from the standpoint of the seller. The considerations that are relevant are those which other sellers in the business community would take into account, when placed in the same situation.

II

The due process requirement that a statute give intelligible guidance to persons affected does not preclude reference to the statute's context in law and public policy as a guide to its meaning. This Court has frequently relied upon history and legal context for the purpose of ascertaining the meaning of criminal statutes attacked for vagueness. *E.g., Nash* v. *United States*, 229 U.S. 373, 377; *United States* v. *Spector*, 343 U.S. 169, 170–171.

It is also settled constitutional law that a statute may incorporate by reference the standards of the business community, or of an appropriate segment, without becoming void for vagueness. The vice in the use of the term "unjust or unreasonable rate or charge" in the Lever Anti-Profiteering Act was that "[t]here was no accepted and fairly stable commercial standard which could be regarded as impliedly taken up and adopted by the statute as this Court construed it." *Small Co.* v. *American Sugar Refining Co.*, 267 U.S. 233, 240–241.

Of course, the commercial standard must be sufficiently meaningful to guide both those subject to the regulation and also the courts and juries that apply it. We think that although borderline cases may arise, there would be no greater difficulty in identifying the relevant business factors, and then determining whether there was no rational relation between the low price and the business conditions confronting the seller, than there is under other statutes which the Court has sustained. *United States* v. *Ragen*, 314 U.S. 513 ("reasonable" allowances for salaries and compensation); *American Tel. & Tel. Co.* v. *United States*, 299 U.S. 232 ("reasonable charge"); *Sproles* v. *Binford*, 286 U.S. 374 ("the shortest practicable route"); cf. *Rattner* v. *California*, 321 U.S. 755 ("unreasonable speed"). The commercial factors which influence a seller's pricing policies are well known and readily identifiable. They include the seller's fixed costs per unit, the variable costs which may decline if the volume of sales increases, the risks of the business, whether the product is new or well-established, the prices of competitors, etc. To select a single figure as *the* right price may involve the exercise of too much judgment for submission to a jury, but there is no such difficulty in deciding whether a price is so low, from the seller's own point of view, that it lacks any rational foundation except the impermissible purpose of destroying competition or eliminating a competitor.

Even if there be doubt as to whether the commercial standard to which the Act refers is sufficiently precise to satisfy the Fifth Amendment in all its possible ap-

plications, Section 3 is plainly constitutional in its application to the conduct with which appellees are charged—sales at prices below National's own costs. *Prima facie* such prices are unreasonably low from the seller's own point of view. No businessman would accept them, absent an intent to destroy competition, unless some specific justification were demonstrated, such as an opportunity to build up volume to the point where unit costs were reduced below the unit price or the need to dispose quickly of excess inventory or damaged goods. A jury is quite capable of ascertaining by reference to commercial practice whether a defendant's explanation sets forth a rational business reason.

III

Appellees are not entitled to have the indictment dismissed merely upon showing that it is unconstitutionally vague as applied to sales above cost but at prices which might nonetheless be thought "unreasonably low." Appellees are charged with sales at less than National's own costs, without reasonable justification. Unless the government proves this misconduct, there must be an acquittal upon the Robinson-Patman counts. Section 3 gives the plainest notice that this misconduct is unlawful. By impliedly incorporating a commercial standard it also supplies judges and juries with an entirely workable test for determining whether the sales below cost were at unreasonably low prices. Both the notice and the standard are derived from the statute. This is sufficient for present purposes. Appellees cannot invalidate a statute the meaning of which is clear and definite as

applied to them, by showing that as applied to someone else, or to some hypothetical conduct, it may be unconstitutional.

ARGUMENT

I

SECTION 3 PROHIBITS SALES MADE WITH PREDATORY INTENT AT PRICES SO LOW AS TO LACK A RATIONAL FOUNDATION IN THE SELLER'S COSTS, MARKET CONDITIONS, BUSINESS PROSPECTS OR EXIGENCIES, OR OTHER CIRCUMSTANCES FACING THE SELLER OF A KIND THAT AN ORDINARY BUSINESSMAN, IN THE SELLER'S POSITION, BUT WITHOUT PREDATORY INTENT, WOULD TAKE INTO CONSIDERATION

The crime defined by Section 3 of the Robinson-Patman Act has three elements: (1) a sale of goods, (2) at "unreasonably low" prices, (3) made for the purpose of destroying competition or of eliminating a competitor from the market.

The meaning of the first and third elements is too plain for discussion. Under the second element the critical question, in our view, is whether an ordinary businessman, who was in the position of the seller and concerned only with his interests, but who had no predatory intent, would say that the price was "unreasonably low." The question of reasonableness is to be answered from the viewpoint of the seller. The standard to be applied is that of the business community. A price is "unreasonably low" under Section 3 when, judged from the standpoint of the seller and according to the standards of the business community, it has no rational justification in existing or foreseeable business conditions, apart from the seller's desire to destroy competition or eliminate a competitor. And a price below the seller's own costs

is unreasonably low, by any normal business standard, in the absence of some extraordinary, identifiable explanation.

That this is the meaning of the disputed phrase fairly and unambiguously appears from the words of Section 3 read in the light of its background and purpose.

A. BACKGROUND AND PURPOSE OF SECTION 3

Section 3 of the Robinson-Patman Act is an important part of the general body of antitrust law intended to preserve a competitive economy with opportunities for small businessmen; it is aimed at a specific weapon of the monopolist—predatory pricing.

Predatory pricing—waging trade wars designed to discipline overzealous competitors or drive them from the market by selling at prices that cause losses ruinous to the small firm, but which the large can absorb—is an especially effective, and hence an especially pernicious, method of destroying competition. A large firm with greater resources than its competitors may acquire a monopoly by selling at unremunerative prices so low as to drive into bankruptcy small competitors unable to absorb the losses, or else to force them to sell the business. In a market dominated by a few giants the smaller firms may be allowed to survive but forced to adhere to the prices and methods of distribution set by the leaders instead of attempting to capture more of the market by *bona fide* competition; in such cases the predatory price war is an effective disciplinary weapon. Such "acts and dealings," when they occur, are "wholly inconsistent with the theory" that the company has been engaged

in "advancing the development of business power by usual methods * * *"; "on the contrary [they] necessarily involved the intent to drive others from the field and to exclude them from their right to trade * * *." *Standard Oil Co.* v. *United States*, 221 U.S. 1, 76. See also Burns, *The Decline of Competition*, 8 (1936); Edwards, *Maintaining Competition*, 159 (1949); Hale & Hale, *Market Power*, 30–31 (1960); Machlup, *The Political Economy of Monopoly*, 147 (1952); Rowe, *Price Discrimination Under the Robinson-Patman Act*, 28 (1962); Thorelli, *The Federal Antitrust Policy*, 67 (1955).

The evil is illustrated in the reported decisions. In one of the early landmark Sherman Act cases, *United States* v. *American Tobacco Co.*, 221 U.S. 106, 160–161, this Court held that an inference that the company had intended to monopolize was justified by the fact, among others, that it had initiated price wars in which it sold below cost, as a result of which it sustained severe losses. See, also, *American Tobacco Co.* v. *United States*, 328 U.S. 781, 807. Similarly in *United States* v. *Corn Products Refining Co.*, 234 Fed. 964 (S.D.N.Y.), another early Sherman Act case, District Judge Learned Hand rested his conclusion that there was an illegal combination which had attempted "to drive out weaker competitors" (p. 1013) partly upon the proof that the principal defendant had sold below cost (pp. 989–990). See also, *Porto Rican American Tobacco Co.* v. *American Tobacco Co.*, 30 F. 2d 234, 237 (C.A. 2), holding that a seller violated Section 2(a) of the original Clayton Act by selling below cost in a particular market, pur-

suant to a "design and plan to put [its competitor there] out of business," using "some real or fancied wrong * * * as an excuse to proceed against and eliminate a weaker competitor." These cases are not legal precedents upon the present issue but they illustrate the evil at which the present law is aimed.

In 1914, when Congress sought to strengthen the antitrust laws and check monopoly in its incipiency by outlawing specific anti-competitive acts or practices, it gave explicit attention to predatory pricing. The House Committee report on the Clayton Act stated (H. Rep. 627, 63d Cong., 1st Sess., p. 8, emphasis added):

> Section 2 of the bill * * * is expressly designed with the view of correcting and forbidding a common and widespread unfair trade practice whereby certain great corporations and also certain smaller concerns * * * have heretofore endeavored to destroy competition and render unprofitable the business of competitors by selling * * * at a less price in the particular communities where their rivals are engaged in business than at other places throughout the country * * *. In the past it has been a most common practice of great and powerful combinations engaged in commerce * * * to lower prices of their commodities, *oftentimes below the cost of production*, in certain communities and sections where they had competition, with the intent to destroy and make unprofitable the business of their competitors * * *.

The 1936 Robinson-Patman amendments were designed to "strengthen the Clayton Act provisions"

(*Federal Trade Commission* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 543–544). Their dominant concern might fairly be said to be the injury to secondary line competition resulting from the discriminatory price reductions and other favors which chain stores and other large buyers were exacting from their suppliers—advantages which Congress believed enabled them to overwhelm their smaller competitors. But this was not the only purpose. The Robinson-Patman amendments were also designed to strengthen the weapons for dealing with price wars that injured primary line competitors. *Federal Trade Commission* v. *Anheuser-Busch, Inc., supra.* For example, as this Court stated in a case based in part upon Section 3 of the Robinson-Patman Act, "Congress by the Clayton Act and Robinson-Patman Act barred the use of interstate business to destroy local business" through predatory price-cutting by which "[t]he profits made in interstate activities would underwrite the losses of local price-cutting campaigns." *Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 115, 119, 120.

Obviously, price discrimination is not the only method of predatory pricing. A large firm may simply absorb losses for the period required to accomplish its purpose, counting upon future monopoly profits to more than offset the loss. Large firms are more often diversified than small business, and they can finance such trade wars out of the profits upon other products. Or the business may be of such a nature that local market conditions govern local prices to such a degree that when the powerful firm resorts to predatory pricing in one market and absorbs any

losses out of the profits in other markets, discrimination cannot be readily proved. The present case furnishes a fair example. The price of milk varies from locality to locality. The indictment alleges that National is engaged in the milk business "throughout the United States" (R. 1); that it sold below cost in seven specified markets for the purpose of destroying competition in each of those markets (R. 9, 12, 15–16, 19, 22, 28–29, 32); and that it "finance[d] and subsidize[d]" its "price war[s] against small dairies selling milk in competition with it" through its operations "in a great many different geographical localities" (*ibid.*).

Since the latter forms of predatory pricing are as dangerous to the economy as price-cutting accompanied by demonstrable discrimination, it would have been surprising if Congress had ignored them. The provision in Section 3 making it unlawful "to sell * * * goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor" reads directly on the evil and is apparently intended to outlaw it. Furthermore, although the original Robinson-Patman bill did not contain Section 3, the legislative history reveals that one of Section 3's chief aims was to strengthen, and thus to make more effective, the various prohibitions of the Clayton Act against geographic price discrimination, including the ban on predatory selling below cost. S. Rep. 1502, 74th Cong., 2d Sess., p. 4; 80 Cong. Rec. 3112, 3113, 6332, 9416; cf. *id.* at 6346.

Section 3 first appeared as part of a Senate bill (S. 4171), introduced by Senators Borah and Van

Nuys, and proposed by Senator Borah as an amendment to the original House bill (80 Cong. Rec. 6348). Much of the amendment overlapped provisions already in the Robinson-Patman bill but one of the substantive provisions that it obviously added was the prohibition now in dispute—a ban upon predatory price-cutting unaccompanied by discrimination. Thus, although the Senate hearings on the Borah-Van Nuys bill were primarily concerned with discrimination, there was also discussion relating to sales made at a loss with the objective of driving competitors out of business or otherwise injuring competition. *Hearings before a Subcommittee of the Committee on the Judiciary, United States Senate, on S. 4471*, 74th Cong., 2d Sess., pp. 14, 18, 64, 85–86.[3] And in the midst of a colloquy about "selling at less than cost," Senator Borah

[3] Thus, Edgar Watkins, attorney for the National Wholesale Grocers' Association, testified that the Borah-Van Nuys bill would fill a gap in the Robinson-Patman bill by prohibiting sales at less than cost for the purpose of destroying competition, under the language "proscribing" sales at "unreasonably low prices" (*id.*, 85–86):

"In further considering the language of this bill, there is a provision in it that seems to me to clearly warrant the suggestion here made about loss leaders. That is a very important subject. I believe it has done more to harm the small independent dealer than almost anything else. It is not covered in the so-called Robinson-Patman bill, and it should be covered. I believe that you have covered it with general language here about unreasonably low prices. When you make an unreasonably low price for the purpose of lessening or destroying competition—and that is the purpose of the loss leader—you can prohibit that by statute, so as to make it a violation of law."

Appellees argue that the reference is only to "loss leaders," but it is clear that witnesses throughout the hearings usually equated loss leaders with sales below cost.

himself stated that his bill was intended "to stop that" (*id.*, p. 53).

B. ANALYSIS OF SECTION 3

The function and meaning of the phrase "unreasonably low prices" in Section 3 become clear when one considers the problem facing a draftsman seeking to carry out the Congressional intention of outlawing all predatory pricing in specific terms instead of relying merely upon the general provisions of the Sherman Act. Simply to proscribe all sales "for the purpose of destroying competition or eliminating a competitor" would encompass the evil but was open to serious objections. One ultimate goal of antitrust policy is to provide purchasers the highest quality of goods at the lowest price. If Firm A has access to cheap raw materials and is so extraordinarily efficient that it can sell at a handsome profit at prices below its competitors' costs, the public should enjoy the benefit even though some of the competitors are eliminated. Had the words "at unreasonably low prices" been omitted from Section 3, Firm A would be in danger of prosecution; for if it knew the effect upon its competitors, it could hardly deny an allegation of purpose. Thus, the evident function of the quoted phrase is to eliminate the danger of outlawing *bona fide* price competition, by confining the prohibition to sales at prices which lack a reasonable economic justification—in other words, to confine it to sales at prices which are irrational or have only a predatory foundation. To accomplish this purpose Congress followed a practice used by legislatures and approved by courts in count-

less instances: it turned to the standards of ordinary reasonable men operating in the environment affected by the legislation, and prohibited sales with predatory intent at prices which are "unreasonably low."

When the function of the phrase "at unreasonably low prices" is kept firmly in mind, the questions concerning its meaning are easily answered. Whether a price is so low as to lack any reasonable economic justification (other than a predatory purpose) must be determined from the standpoint of the individual seller. The statute is not concerned with the buyer's appraisal. From his viewpoint no price is objectionably low, except as he may see the transaction through someone else's eyes. Nor are the costs or profits of other sellers relevant. Section 3 is not legislation designed to curtail price competition based upon efficiency of operation and thereby secure every firm a reasonable profit measured by some objective test. It is concerned, as shown above, with protecting the public against one of the familiar weapons of the monopolist. The test taking into account all three elements of the crime—is whether the seller fixed the price so low, with the specific intent to destroy competition or to eliminate a competitor, that the price has no rational foundation in the seller's costs, or in market conditions or other business exigencies facing the seller of the kind that would be taken into consideration by an ordinary businessman, in his position, lacking a predatory intention.

The elements of predatory intent and "unreasonably low prices" are often interrelated. A seller cannot be

heard to assert that his price is reasonable, from his own point of view, because selling at so low a price is a good way to destroy competition. Also, the proof which establishes the seller's predatory intent may be much the same as the proof that the price was unreasonably low. For example, the evidence in a given case might show that a large nationwide concern selling milk in a particular locality at the market price suddenly cut its price 25 percent to a point well below its own cost of production, as shown by its own books, shortly after several small local concerns had attempted to expand their sales in the market by offering trading stamps with home deliveries; and there might be further evidence negating any of the normal business justifications for the price reduction. This evidence would support a finding of a subjective intent to destroy competition because it shows a plausible motive and negates other explanations for the seller's conduct. The evidence would also justify a jury in finding that the price was unreasonably low by objective standards, *i.e.*, that even from the seller's own point of view it had no rational foundation in his costs or in market conditions or other business exigencies of the kind taken into account by an ordinary businessman without predatory intention. Nevertheless, the two elements serve distinct and important functions. Proof of the predatory intention will not establish a violation of Section 3 if the price yields a reasonable profit or is otherwise justified by normal business considerations. Conversely, even if the price is unreasonably low by objective standards, the defendant must be acquitted if the jury finds that his conduct is to be

explained not by a predatory intent but by an abnormal aberration such as a gross error in bookkeeping, a desire to make gifts to his customers, or an innate inability to tell whether the price cut was rational from the standpoint of his own business.

The factors compendiously summarized in Section 3 by the term "reasonable" are those which would be considered relevant by the business community, just as they are in determining whether a trucker has used "the shortest practicable route" (*Sproles* v. *Binford*, 286 U.S. 374, 380) or a trustee has exercised "reasonable care and skill" in the management of an estate *Restatement of Trusts*, §§ 174, 227). Similarly, the standard by which the reasonableness of the explanation for an unusually low price is to be judged is that of the business community. The trier of the facts will ask, first, what considerations might an ordinary businessman take into account that could explain or justify the price attacked as unreasonably low and, second, would such a man be satisfied by the proffered justification. Since it is only "*un*reasonably" low prices that statute proscribes, questions of degree would be resolved in favor of the seller. He would be acquitted unless his prices, made with a predatory intent, fell outside the range of what an ordinary businessman, acting as the seller, would consider reasonable under the same conditions.

We discuss in more detail at pages 30–32, 38–43 below the factors that an ordinary businessman would consider relevant, and the standards that he would apply, in determining whether a price is unreasonably low. Suffice it to say that it is common knowledge that

the business community unanimously holds that under normal conditions prices must be high enough to cover costs, and that in the absence of some special justification a price below the seller's own costs is unreasonably low. When no valid justification exists—and under the statute an intent to destroy competition cannot be a justification—sales below cost are also precisely the kind of anticompetitive practice that Congress considered to pose so serious a threat to our economy as to warrant the imposition of criminal penalties. For both reasons they plainly constitute sales at "unreasonably low prices" within the meaning of Section 3.

II

SECTION 3, AS THUS CONSTRUED, IS SUFFICIENTLY DEFINITE AND CERTAIN TO SATISFY THE REQUIREMENTS OF THE FIFTH AMENDMENT, AT LEAST AS APPLIED TO SALES BELOW THE SELLER'S OWN COSTS AS CHARGED IN THE INDICTMENT

The constitutional requirement of definiteness in criminal statutes serves several purposes: (1) it insures that persons will be given adequate warning of what conduct is criminal and thus enables them to conform their behavior to the requirements of the law; (2) it provides juries and judges with adequate standards for identifying the proscribed conduct and imposing criminal sanctions according to rule (*Boyce Motor Lines, Inc.* v. *United States*, 342 U.S. 337, 340; *United States* v. *Petrillo*, 332 U.S. 1, 7; *United States* v. *Ragen*, 314 U.S. 513, 524; *Sproles* v. *Binford*, 286 U.S. 374, 393); and (3) by providing such a standard it ensures uniformity in the administration of justice in diverse circumstances and regions. The constitutional requirement is that there be a "reasonable de-

gree of certainty." *Boyce Motor Lines, Inc.* v. *United States, supra,* 342 U.S. at 340; *Winters* v. *New York,* 333 U.S. 507, 524–526 (Mr. Justice Frankfurter, dissenting). It is not only permissible but essential that an area of judgment be left to judge or jury in applying general standards to specific situations.

Section 3 is sufficiently definite to warn businessmen of what conduct is criminal. No businessmen reading Section 3 could have any doubt about whether the law forbade him to sell goods at prices below his own costs "for the purpose of destroying competition or eliminating a competitor." The requirement of a specific, evil intent immediately eliminates the danger that anyone will be convicted of crime merely because his prices are found too low by a court or jury. And one who sells his products at prices set low for a purpose so plainly inconsistent with our historic antitrust policy cannot honestly plead surprised innocence. In this respect the case is like *United States* v. *Ragen,* 314 U.S. 513, where the requirement of proof of an intent "to evade and defeat a tax" saved a prohibition against deducting more than a reasonable allowance for salaries, and *Hygrade Provision Co.* v. *Sherman,* 266 U.S. 497, where language that might otherwise have been too vague to support a criminal prosecution was confined by the further statutory requirement of proof of a specific intent to defraud.

Appellee's only answer at the initial argument was that "when the act prohibited is unascertainable, any requirement of intent becomes a nullity. No one can be held to intend something which is unknown and unknowable" (Br. p. 36). This misses the point

entirely. The intent required by Section 3 is not merely an intent to do the prohibited act; it is a specific intent to "destro[y] competition or eliminat[e] a competitor." One knows when he has such purpose.

We think it equally plain that a businessman knows that a price below the seller's own costs is "unreasonably low" in the absence of some specific and readily ascertainable explanation. The adequacy of the warning can be fairly tested by asking whether, quite apart from any law, top company officials would be satisfied with a regional manager who repeatedly sold goods at less than cost and when asked for an explanation replied, "Why, I'm surprised. We're not making money on the sales, and there's no special reason for selling below cost; but I just never supposed that you would consider prices below our costs to be unreasonably low."

The critical phrase in Section 3, as construed in Point I, is also sufficiently definite to enable courts and juries not only to identify the conduct proscribed by Congress but to impose criminal sanctions uniformly throughout the country according to rule. It does not render a statute unconstitutionally indefinite that its meaning is derived partly from its history and context. We develop this point immediately below (pp. 25–26). Nor is it unconstitutional to incorporate by reference a business standard generally known to the businessmen subject to the statute and ascertainable by judge and jury. This is a common and constitutional practice, as we show at pp. 26–30. And the business standard in question is sufficiently precise, at least as applied to sales below cost, to meet the most exacting constitutional test (see pp. 30–43).

A. THE MEANING OF A STATUTE MAY BE ASCERTAINED BY REFERENCE TO ITS HISTORY AND CONTEXT

We concede that a stranger well versed in the English language but utterly ignorant of American history and the evolution of antitrust law would have difficulty in determining the meanings of the relevant phrases in Section 3. The point of view from which the question of unreasonableness is to be judged, and also the relevant considerations, could hardly be determined by reading the words in a vacuum. However, once one looks to the history and legal context which reveal the function of the statute, the answers to those questions become plain. See pages 11-22 above.

The Fifth Amendment does not forbid using the history and legal context to ascertain the meaning of a criminal statute. Reliance on these familiar processes of interpretation has often been sustained in cases in which a statute was attacked as unconstitutionally vague. Thus, in *Nash* v. *United States*, 229 U.S. 373, 377, Mr. Justice Holmes indicated that one of the grounds for sustaining the Sherman Act against charges of unconstitutional indefiniteness was that the act took up the common law as to restraint of trade. In *American Tel. & Tel. Co.* v. *United States*, 299 U.S. 232, 246, the Court upheld a regulation prohibiting utilities from including more than "reasonable" charges in specified statements of account, violation of which was a criminal offense, on the ground that the term was amplified by the "context" of "good morals" and the well-known evils against which it was directed. Again in *United States* v. *Spector*, 343 U.S. 169, 170–171, the "statutory setting" revealed the

meaning of the words "timely" and "necessary," under a law penalizing wilful failure or refusal of an alien subject to a deportation order "to make timely application in good faith for travel or other documents necessary to his departure." See also *United States* v. *Harriss*, 347 U.S. 612. We know of no case in which the Court has even intimated that the due-process requirement that a statute give intelligible guidance to persons affected precludes reference to the statute's context in law and public policy.

B. A STATUTE MAY CONSTITUTIONALLY INCORPORATE BY REFERENCE A BUSINESS STANDARD FAMILIAR TO PERSONS AFFECTED BY THE LEGISLATION AND READILY ASCERTAINABLE BY JUDGE AND JURY

Legislatures necessarily use generic and inclusive terms to cover categories of proscribed behavior. The general terms must then be interpreted and applied both by the persons regulated and by the enforcing tribunals. Such a process is inherent in the limitations of language itself. It would be futile for the legislature to try to predict and prescribe a detailed rule for multifarious specific situations. And too rigid a rule would inevitably lead, by reason of failure to foresee all relevant circumstances, to greater arbitrariness than the use of a general and flexible test.

One familiar solution to this dilemma is to incorporate into the legislation the usages and standards of the relevant portion of the community. The constitutionality of this practice is beyond dispute. "The test is whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices."

Jordan v. *DeGeorge*, 341 U.S. 223, 231–232. In *United States* v. *Ragen*, 314 U.S. 513, the revenue act allowed deductions for "a reasonable allowance for salaries or other compensation for personal services," thus incorporating the standards of the business community; the Court rejected the argument that the statute was unconstitutionally vague, terming it a "negation of experience and common sense" (p. 524). In *Ratner* v. *California*, 321 U.S. 755, the State's motor vehicle code made the criminality of defendant's conduct depend upon whether he was driving at "unreasonable" speed, thereby adopting the general community standard of reasonableness. This Court held that an appeal attacking the statute as unconstitutionally vague did not even raise a substantial federal question. Other statutes have been sustained against attack for vagueness which use such terms as "reasonable" or "feasible" with reference to the circumstances and practices of particular industries. *Bandini Petroleum Co.* v. *Superior Court*, 284 U.S. 8, upheld a prohibition of "unreasonable" waste of natural gas enforceable by injunction, and found that the standard was sufficiently explained by conditions in the petroleum industry and matters of science and common knowledge. In *Boyce Motor Lines, Inc.* v. *United States*, 342 U.S. 337, the Court upheld a criminal conviction for violation of an Interstate Commerce Commission order which prohibited; "so far as practicable, and where feasible," the transportation of explosives and poisonous gas "through congested thoroughfares, places where crowds are

assembled, street car tracks, tunnels, viaducts, and dangerous crossings" (p. 339); the relevant factors in determining guilt were the comparative merits of other routes as "both commercially practicable and appreciably safer" (p. 342). In *Sprotes* v. *Binford*, 286 U.S. 374, 389, a State statute was upheld which exempted from limits on truck length and weight any vehicles used to transport shipments from point of origin to a shipping terminal "by the shortest practicable route," since the phrase was given meaning by common usage and understanding. The principle is also squarely supported by *McGowan* v. *Maryland*, 366 U.S. 420, 428, which sustained a criminal Sunday closing law, which exempted sales of "merchandise essential to, or customarily sold at, or incidental to, the operation of" certain recreational enterprises. The Court pointed out that the applicability of the phrase could be easily comprehended by resort to "ordinary commercial knowledge" and the results obtainable from "a reasonable investigation" into the activities of "nearby" exempted business.

Appellees' argument, like the decision below, is predicated chiefly upon the verbal parallel between the words "unreasonably low prices" in Section 3 and the provision of the Lever Anti-Profiteering Act making it "unlawful * * * wilfully to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries," which was held unconstitutionally vague in *United States* v. *Cohen Grocery Co.*, 255 U.S. 81. The vice of that statute was not its use of the term "reasonableness" as such, but its failure to relate this rule of reason to any point of

view, and to a standard or practice discernible from either the historical background of the legislation or the common understanding of persons to whom it applied. The fatal fault was succinctly summarized in a subsequent decision under the Lever Act (*Small Co. v. American Sugar Refining Co.*, 267 U.S. 233, 240–241):

> * * * [T]here was no accepted and fairly stable commercial standard which could be regarded as impliedly taken up and adopted by the statute as this Court construed it. * * *

Mr. Justice VanDevanter went on to contrast a New York rent control law which had been upheld against constitutional attack saying that "[W]hat is just and reasonable between landlord and tenant in view of the value of property and the outlay which the owner must make for taxes and other current charges" were "matters which in the usual course of business come to be fairly well settled and understood." The New York statute presented a quite different case, the Justice concluded (pp. 241–242), because—

> * * * A standard thus developed and accepted in actual practice, when made the test of compliance with legislative commands or prohibitions, usually meets the requirement of due process of law in point of being sufficiently definite and intelligible.

The instant case falls in the latter category. The question of "unreasonableness," as we have shown, is to be judged from the standpoint of the seller. This fact also distinguishes *United States v. Trenton Potteries Co.*, 273 U.S. 392, 398, where Mr. Justice Stone

was speaking of the vagueness of the test of "reasonable prices" when one is left at large to consider all the divergent interests of which the community is composed. The statute in the present case takes up the standards of the business community by which to judge whether the seller, instead of behaving as an ordinary reasonable businessman, fixed a price, with intent to destroy competition or eliminate a competitor, which had no rational foundation in the seller's costs, or in the market conditions or other business exigencies of a kind that would be taken into consideration by ordinary businessmen in the same position. And since, as we show in the next section, these too are matters "which in the course of business [have] come to be fairly well settled and understood," Section 3, at least as applied in this case, "meets the requirement of due process of law in point of being sufficiently definite and intelligible" (*Small Co.* v. *American Sugar Refining Co.*, 267 U.S. at 241-242).

C. THE BUSINESS PRACTICES AND STANDARDS TAKEN UP BY SECTION 3 ARE SUFFICIENTLY ASCERTAINABLE AND DEFINITE, AT LEAST APPLIED AS TO SALES BELOW COST, TO SATISFY THE REQUIREMENTS OF THE FIFTH AMENDMENT

Custom and business understanding readily identify the factors that are to be taken into consideration in determining whether the seller fixed a price so low, with the specific intent to destroy competition or to eliminate a competitor, as to have no rational foundation in business conditions such as would be taken into consideration by ordinary businessmen, in the same position, lacking predatory intention. They include the seller's costs, both direct and indirect, the

opportunity to reduce unit costs by increasing volume, the quality and condition of his goods, the market price or the prices of his competitors, the ratio of profit to both gross sales and invested capital, an urgent need to liquidate inventory, and a host of similar considerations. The list of relevant factors and their relative importance will vary somewhat from industry to industry and even from case to case. The point is simply that the factors which a rational businessman would take into account are thoroughly familiar in the several segments of the business community. The businessman subject to the statute would feel no uncertainty about how to guide his conduct.

In practical operation the business firms governed by Section 3, and the judges and juries which must apply it, will not be determining the reasonableness of an initial price in a vacuum but will decide whether a firm dropped its prices unreasonably. The seller's previous prices and practices, as well as the prices and practices of other merchants in the same market, would be available for comparison; and the question would be whether there was no rational business explanation for the drop, other than the desire to destroy competition. In answering this question, as Judge Yankwich pointed out in *F. & A. Ice Cream Co.* v. *Arden Farms Co.*, 98 F. Supp. 180, 190, "additional elements other than those already mentioned, such as cost, usual profits and the like, would be available for consideration. Among them might be mentioned the suddenness of the price change, its relation to previous prices charged by the merchant or by others in the

field in the particular locality or elsewhere, the existence or non-existence of new economic factors relating to cost of production, demand for the article, seasonal or other, the consequent need for expansion or contraction of the field for the particular merchandise and other factors, financial or economic, which might or might not warrant a precipitate reduction in price."

The standard by which the reasonableness of the explanation for an unusually low price is to be judged is also that of the business community. And since it is only "unreasonably" low prices that statute proscribes, doubtful questions of degree are to be resolved in favor of the seller. He is to be acquitted unless his prices, made with a predatory intent, fell outside the range of what an ordinary businessman, acting as the seller, would consider reasonable under the same conditions.

This Court has consistently sustained the use of such terms as "reasonable" and "unreasonable" in criminal statutes where, as here, the understanding and practices of the relevant segment of the community will define the legal obligation, as applied to particular instances. In *United States* v. *Ragen*, 314 U.S. 513, 523, the Court said "[t]he mere fact that a penal statute is so framed as to require a jury upon occasion to determine a question of reasonableness is not sufficient to make it too vague to afford a practical guide to permissible conduct." Particularly pertinent is *Nash* v. *United States*, 229 U.S. 373, in which the Court upheld a conviction for conspiracy in restraint of trade and to

monopolize in violation of the Sherman Act over the contention that the statute was indefinite. See also *Miller* v. *Oregon*, 273 U.S. 657, sustaining a conviction for driving at a "dangerous" rate of speed; *Baudini Petroleum Co.* v. *Superior Court*, 284 U.S. 8, upholding a prohibition against "unreasonable" waste of natural gas; *Sproles* v. *Binford*, 286 U.S. 374, upholding a State statute regulating trucks on the highways with an exception for certain trips "by the shortest practicable route"; *American Tel. & Tel. Co.* v. *United States*, 299 U.S. 232, sustaining a regulation carrying criminal penalties for including more than "reasonable" charges in specified statements of account; *Ratner* v. *California*, 321 U.S. 755, sustaining a conviction for an offense involving driving a motor vehicle at "unreasonable speed"; *United States* v. *Lemer*, 143 F. 2d 298, sustaining a conviction of trading with one whom the defendant had "reasonable" cause to believe to be an enemy of the United States.

The cases relied upon by appellee are all distinguishable upon the same ground as *Cohen Grocery* and other Lever Act cases; in each "there was no accepted and fairly stable commercial standard which could be regarded as impliedly taken up and adopted by the statute, as this Court construed it" (*Small Co.* v. *American Sugar Refining Co.*, 267 U.S. 233, 240–241). There are also other distinctions. In *International Harvester Co.* v. *Kentucky*, 234 U.S. 216, the State antitrust law punishing combinations in restraint of trade where the purpose or effect was to fix a price in excess of the "market value under fair

competition, and under normal market conditions" (p. 221), was held unconstitutional because it required the defendants to "think away the principal facts of the case as it exists and say what would have been the price in an imaginary world" (p. 222). The opinion distinguishes *Nash* v. *United States*, 229 U.S. 373, upon the ground that the Sherman Act deals "with the actual, not with an imaginary condition other than the facts" (p. 223). The instant case also deals with actual market conditions; whether the defendant's price is unreasonably low depends upon his costs, his profits, his business problems and the market conditions actually facing him. The judgment is to be based upon prevailing practices and current facts well known to those affected.

Cline v. *Frink Dairy Co.*, 274 U.S. 445, is distinguishable upon similar grounds. Although the State law prohibiting conspiracies in restraint of trade was held invalid because it contained an exception for combinations whose purpose was to obtain "a reasonable profit," the vice was not merely the use of the term "reasonable" but, as stated at page 457–458 of the opinion, that the statute called for a forecast upon hypothetical events: "To compel defendants to guess on the peril of an indictment whether one or more of the restrictions of the statute will destroy all profit or reduce it below what would be reasonable, would tax the human ingenuity in much the same way as that which this Court refused to allow as a proper standard of criminality in *International Harvester Co.* v. *Kentucky*, 234 U.S. 216, 232, 233."

Since one member of the Court suggested during the oral argument of this case at the 1961 term that *Connally* v. *General Construction Co.*, 269 U.S. 385, where the Court invalidated a State law requiring payment of the "current rate of per diem wages in the locality", might be controlling in the instant case, we discuss the case at length, noting preliminarily that its vitality as the precedent is perhaps diminished by the change in judicial attitude towards minimum-wage laws and by several decades of experience under State and federal prevailing wage laws such as the Walsh-Healey and Davis-Bacon Acts. In our view the *Connally* decision is distinguishable upon two grounds.

First, the State law called upon certain employers to ascertain the "current wage rate" in the community for each classification of employees in situations in which one would frequently find not a single uniform rate for a classification but, at best, clusters of rates within a range. The purpose of such a law is to prevent the expenditure of public funds upon projects often let by competitive bidding from undermining the labor standards of the community. If the purpose of Section 3 of the Robinson-Patman Act were to assure the average retailer a margin between cost and selling price upon which he could operate at a profit, then Section 3 would require some general market-wide determination of an "unreasonably low price." But that is not the purpose of Section 3. See pp. 12–22 above. Section 3 is concerned with predatory pricing and the question whether the price is

"unreasonably low," unlike whether the wage is "prevailing" or "current," is to be determined not from the standpoint of the market generally but from the standpoint of the seller.

Second, although the term may be precise enough in economic theory, the current wage rate in a locality may be an utterly unintelligible standard for the actual operation of a business. It is easily applied in a locality where the hourly wage rate paid 90 percent of the journeymen electricians is $3.50, regardless of differences in skill, but a few marginal contractors are paying hourly rates of $3.25, $3.00 and even $2.85. The growth of labor unions has made this a common situation. It is not extraordinary even today, however, to find a wide spread of rates for employees in a single craft or classification. Thus, in our hypothetical community the rates might be:

	Percent
$3.50 an hour	5
$3.35 an hour	10
$3.25 an hour	25
$3.20 an hour	20
$3.10 an hour	10
$3.00 an hour	20
$2.90 an hour	5
$2.85 an hour	5

In the absence of an administrative finding or a customary definition of "current", a contractor could not possibly tell which was the current or prevailing rate. The opinion shows that this kind of problem did in fact confront the employer in the *Connally* case (269 U.S. at 393), and it must have been a common situation in Oklahoma in the mid-twenties. As the Court itself said, "the vice in the statute here lies in the impossibility of ascertaining, by any reasonable

test, that the legislature meant one thing rather than another, and in the futility of an attempt to apply a requirement, which assumes the existence of a rate of wages single in amount, to a rate in fact composed of a multitude of gradations" (269 U.S. at 394). There is no similar problem in determining whether a seller's prices are "unreasonably low" under Section 3. The test is whether they have no rational foundation in factors (*e.g.*, the seller's costs, or in the market conditions or other business exigencies facing the seller) of a kind which an ordinary businessman in the seller's situation, but lacking predatory intent, would take into consideration.

For the foregoing reasons we conclude that the relevant provisions of Section 3 are not so vague or indefinite as to violate the Fifth Amendment. Borderline cases may arise that present some difficulty, especially where the selling price is above the seller's costs and it is argued that the profit is too small for the price to be reasonable. This degree of uncertainty has never been thought to vitiate a criminal statute. As Mr. Justice Holmes stated, in upholding the constitutionality of criminal penalties for violation of the Sherman Act's prohibition of unreasonable restraints of trade, "the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here, he may incur the penalty of death." *Nash* v. *United States*, 229 U.S. 373, 377. It is difficult to see how a more precise standard could

have been written. Cf. *United States* v. *Petrillo*, 332 U.S. 1.

In the present case, however, it is unnecessary to decide whether the understanding and practices of the business community taken up by Section 3 give the term "unreasonably low prices" a sufficiently definite meaning in every possible application. This is no borderline situation. Appellees are charged with selling at prices below their own costs of production. And the business community unanimously holds that under normal conditions prices must be high enough to cover costs and that a price below the seller's own costs is unreasonably low in the absence of some special justification. "* * * [I]t would ignore the economic facts of life to say that one in business for a profit would deliberately and consistently sell at a loss without some ulterior motive. It would be equally inadmissible to say that one who consistently sells at a loss without competitive compulsion is not selling at unreasonably low prices." *Ben Hur Coal Co.* v. *Wells*, 242 F. 2d 481, 486 (C.A. 10).

Selling below cost, in the absence of special circumstances, is explicable only as part of a campaign to destroy competition; and it inevitably will have that effect when practiced by a company of substantial resources. Small and weak concerns cannot hope to endure against a strong competitor who undertakes to sell at a loss. If such loss-selling is intended to stop price competition, the weak firms must either soon capitulate to the demands of the big competitor and

raise their prices, or go under. If it is intended to drive the weak firms out of business, the plan is almost certain to succeed if the predatory price-cutter has sufficient economic strength to outlast his weaker rivals. The need or opportunity to destroy competition cannot be invoked as a justification which makes a price below cost reasonable. On the contrary, it is plain from the proscription of sales at unreasonably low prices "for the purpose of destroying competition or eliminating a competitor" that this element of gain to the seller is not a permissible factor in judging the question of reasonableness. Indeed, the seller's predatory intent is the very core of the illegality.

Business accounts are kept to measure the profit and loss of operations, a computation requiring ascertainment of costs. The corporate books themselves are likely to be important evidence in showing that sales were made below cost. Here, the charge is that National "intentionally" sold below its cost. The indictment itself suggests, therefore, that proof will be taken from corporate documents of which National had specific knowledge. The same proof was relied on by Judge Learned Hand in *United States* v. *Corn Products Refining Co.*, 234 Fed. 964 (S.D.N.Y.), in upholding in a Sherman Act civil case a charge of selling at unreasonably low prices with a predatory purpose. In that case, the corporate accounts (p. 990) were supplemented by intracorporate communications showing management's contemporaneous understanding (p. 989), historic industry pricing patterns (pp.

988–989), and the expert opinion of those familiar with the industry (p. 991). Similarly, in upholding the constitutionality of Section 3, Judge Yankwich (who has had extensive experience assessing evidence in antitrust cases) pointed out that the problems of proof of cost, as well as of other pertinent factors, could be resolved by using "ordinary business and accountancy methods." *F. & A. Ice Cream Co.* v. *Arden Farms Co.*, 98 F. Supp. 180, 189 (S.D. Cal.).

Appellees' argument that " 'selling below cost' is a vague and indefinite standard" (Brief on Initial Argument, pp. 58–71) misses the point entirely. The government has never suggested either that Section 3 forbids all sales below cost or that any particular methods of cost accounting have special significance. Our position is that common usage and understanding are enough to inform the management of a business that selling at a loss (*i.e.*, below its own costs), constitutes selling at "unreasonably low prices" unless there are abnormal business circumstances which justify the losing operations. Section 3 gives plain evidence that the purpose to destroy competition is not a justification, but rather is the heart of the violation. All appellees had to do was to sell above cost, a normal business objective, or to justify losses by business exigencies other than the wish to injure competitors.

The application of this standard scarcely raises the refined problems of cost accounting which might require resolution in drafting or interpreting a rigid

prohibition against sales below cost.[1] Since Section 3 deals with "unreasonable" conduct, if the seller reasonably thinks that he is not incurring a loss on the sales, that is the end of the matter. Moreover, since Section 3 is aimed at predatory pricing, the overwhelming proportion of the cases that can be expected to arise will, like the present case, involve a drop in the price at which an established firm is selling a regular product. The seller's own books and established methods of accounting will therefore be available as evidence. A seller who drops his prices, without a nonpredatory reason, to a level which is below cost according to his own records and methods of cost accounting, is not conforming to the standards of the business community and his prices are "unreasonably low"; whereas if the sales are yielding a profit according to the seller's *bona fide* method of accounting, no inference of unreasonable pricing could be drawn merely from proof that, according to another method of accounting, he is selling at a loss.

To be sure, there are special situations in which sales below cost have a legitimate commercial justification. The price fixed by competition in the sale of the product may be below the costs of the particular

[1] Under State laws prohibiting sales below cost an accurate objective determination of costs would be essential. Such laws are collected and discussed in Clark, *Statutory Restrictions on Selling Below Cost*, 11 Vand. L. Rev. 105 (1957). It would also be essential if the Congress were to enact a similar law. This was one of the reasons for the Department of Justice's opposition to a federal law prohibiting sales below cost, and it apparently stimulated the Federal Trade Commission to propose a more exact definition. *Hearings before a Subcommittee of the House Committee on Interstate and Foreign Commerce on H.R. 10235*, 86th Cong., 2d Sess., pp. 4–5, 6, 7.

firm. Sales below cost may dispose of excess inventory, of obsolete or spoiling merchandise, or of merchandise in a line which the seller no longer wishes to produce or distribute; they may be made to introduce a new product or to break into a new market; or they may be designed to retain a customer by meeting in good faith the equally low price of a competitor. Under certain conditions a business firm might reasonably drop its price below its unit costs at the current volume of sales in the belief that the volume of sales could be so greatly increased as to reduce the unit price and secure a larger total profit. A firm might sell a byproduct or carry a minor line priced at less than its fully distributed costs where this would increase its net income from all sales. Other explanations may be rational in the circumstances of a particular case. One who sells at a loss, however, is departing from the norm. The circumstances which might make so low a price reasonable are readily identifiable. If none exists, the price below cost is "unreasonably low." In short, whatever room there may be for differences as to whether a price is "unreasonably low" because it does not yield a sufficient profit, in the absence of extraordinary circumstances there is none about sales below costs.

In sum, when Section 3 is read as a living directive addressed to the business community in a context of antitrust problems and policies, it conveys adequate warning to business firms that if they sell below cost for the purpose of destroying competition, they are committing a criminal offense. "[C]ommon usage and understanding" (*Boyce Motor Lines* v. *United States*, 342 U.S. 337, 340–341) are enough to inform

the management of a business that selling at a loss constitutes selling at "unreasonably low prices" unless there are abnormal business circumstances which justify the losing operations. Section 3 gives plain evidence that the purpose to destroy competition is not a justification, but rather is the heart of the violation. Thus, the avoidance of this plain violation of Section 3 was not beyond the "ready comprehension" (*United States* v. *Ragen*, 314 U.S. 513, 524) of National's management.

Determining appellees' guilt or innocence under the statute will be easily within the competence of judge and jury. Common understanding, together with prior experience in cases dealing with predatory price-cutting under other statutes, demonstrates that "sales below cost" and the possible justifications are susceptible to judicial proof, just as they are to a businessman's knowledge.

III

SINCE SECTION 3 IS CONSTITUTIONAL AS APPLIED TO THE SALES BELOW COST CHARGED IN THE INDICTMENT, THERE IS NO OCCASION TO CONSIDER ITS CONSTITUTIONALITY AS APPLIED TO OTHER SITUATIONS

It is a settled principle of constitutional adjudication that the Court will restrict its decision of constitutional questions to the facts before it—to the constitutionality of the statute *as applied to the litigant* and will refuse to determine the general validity of statutory provisions in the abstract, on the basis of their possible application to other situations. Since "[t]he delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases [that may be] imagined"

(*United States* v. *Raines*, 362 U.S. 17, 22), "[i]t has long been [this Court's] considered practice not * * * to decide any constitutional question except with reference to the particular facts to which it is to be applied." *Alabama State Federation of Labor* v. *McAdory*, 325 U.S. 450, 461; *United Public Workers* v. *Mitchell*, 330 U.S. 75, 89–90. If the statute is constitutional as applied, the Court will not look beyond to peripheral cases which may pose more difficult constitutional problems. *Robinson* v. *United States*, 324 U.S. 282; *United States* v. *Fruehauf*, 365 U.S. 146, 157; *Barrows* v. *Jackson*, 346 U.S. 249, 257; *United States* v. *Harriss*, 347 U.S. 612, 618. The *United Public Workers* case, *supra*, illustrates the principle. There this Court upheld the prohibition in the Hatch Act against taking "any active part in political management or in political campaigns," as applied to the clear case of a ward executive committeeman and worker at the polls, but expressly refused to examine any further at that time into the validity of the general standard.

In the present case the counts laid under the Sherman Act charged a continuing conspiracy to restrain trade by fixing prices, by driving small firms from the market, and by fixing and maintaining differentials applicable to various kinds of sales of milk. The seven counts under the Robinson-Patman Act, with which we are now concerned, are exemplified by Count 2 on page 9 of the Record. Paragraph 22 charges that for a month in the summer of 1958 National Dairies—

> sold milk to its distributor in the Paola-Osawatomie, Kansas market at unreasonably low

> prices for the purpose of destroying competition in the Paola-Osawatomie, Kansas market in violation of Section 3 * * *.

Paragraph 23 particularizes the charge:

> * * * National utilized the advantages it possesses by reason of the fact that it operates in a great many different geographical localities in order to finance and subsidize a price war against small dairies selling milk in competition with it and its distributor in the Paola-Osawatomie, Kansas market by intentionally selling milk to its distributor Martin at prices below National's cost.

Thus, since the charge is that National violated Section 3 by selling at prices below its own costs for the purpose of destroying competition, there is no occasion for the Court to rule upon the definiteness of Section 3 as it might be applied in other situations. Appellees had ample warning that their conduct was illegal. They cannot be heard to complain because some other firm might have doubt about the impact of the statute upon some other line of conduct.

Appellees argued in their original brief (pp. 5–16) that the offenses charged in the indictment are not limited to sales below cost because paragraph 22 and the corresponding paragraphs in the other counts follow the words of the statute. But the particularization of the offense set forth in paragraph 23 plainly limits and qualifies the broader language of paragraph 22. Paragraph 23 makes it explicit that the sales at "unreasonably low prices" charged in this indictment are sales "at prices below National's cost." It is the two paragraphs together, the second limiting the first, that set forth the offense charged in Count Two.

"[T]he indictment must be read as a whole, not by sentences." *United States* v. *Minneapolis Electrical Contractors' Ass'n*, 99 F. Supp. 75, 78 (D. Minn.). The charging portion of the count explicitly sets forth the "Offense Charged" in two paragraphs under that heading, and not just in the statutory language used in the first paragraph. The "Effects" paragraph of the count, which immediately follows the two paragraphs setting forth the "Offense Charged," plainly refers to those two preceding paragraphs when it speaks of the effects of the "aforesaid offense." The two paragraphs of the charging portion of the count thus constitute the "plain, concise and definite written statement of the essential facts constituting the offense charged," which Rule 7(c) of the Federal Rules of Criminal Procedure requires the indictment to contain.[*]

This interpretation of the indictment is in accord with the rule that when various acts are alleged in a single count, "all of its recitations and averments must therefore be read and considered together." *Blackwood* v. *United States*, 138 F. 2d 461, 463 (C.A. 8); see, also, *McCoy* v. *United States*, 169 F. 2d 776, 780

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[*] Contrary to appellees' contention (Original Br. 8-9), government counsel did not state to the district court that "the indictment has a broader scope than below-cost sales." The colloquy upon which appellees rely, during which government counsel stated that an unreasonably low price "does not have to be below cost" (R. 125), related to the general scope of the statute, and not to the offense charged in this particular indictment. Indeed, appellees' counsel himself previously had recognized that "one argument that the Government makes is, certainly it is an unreasonably low price where a defendant charged under Section 3 sells below cost" (R. 95).

(C.A. 2), certiorari denied, 335 U.S. 898; *United States* v. *Shindler*, 173 F. Supp. 393, 395 (S.D.N.Y.). In the *Shindler* case, Count Two of the indictment charged a violation of Section 17(a)(2) of the Securities Act of 1933, "first, in the language of the statute [the defendant 'did unlawfully * * * obtain money * * * by means of an omission to state a material fact necessary to make the statements made, in the light of the circumstances under which they were made, not misleading'], and then by particularizing the acts complained of [having called the attention of the purchasers of stock to the price at which it was selling on the American Stock Exchange, 'but having omitted to state the material fact that said price of said stock had been caused to rise and had been prevented from falling by the said defendants * * *']." In refusing to dismiss this count, the court stated (p. 395, emphasis added): "By going beyond the statutory language with greater specificity the defendants are more fully informed of the crime charged, enabling them thereby to prepare their defense to meet the prosecution's case, and at the same time protected against double jeopardy. *The parts of the count must be read together.*"

Appellees' argument implicitly assumes that the government will not be limited at trial to proof of the acts specified in the second paragraph of each of the Robinson-Patman Act counts. Yet such a limitation would clearly be imposed if the specifications had been contained in a bill of particulars. *E.g., United States* v. *Neff*, 212 F. 2d 297, 309 (C.A. 3); *Land* v. *United States*, 177 F. 2d 346, 349 (C.A. 4); *Bergen*

v. *United States*, 175 F. 2d 223, 224 (C.A. 5); *Braatelien* v. *United States*, 147 F. 2d 888, 892 (C.A. 8); *United States* v. *Glasser*, 116 F. 2d 690, 702 (C.A. 7), modified on other grounds, 315 U.S. 60.* *A fortiori*, when the indictment itself particularizes the acts alleged to violate the statute, appellees can be convicted only if the specific acts charged are proven. Cf. *Stirone* v. *United States*, 361 U.S. 212.

Our contention that the only question is whether Section 3 is constitutional as applied to the conduct with which appellees are charged in the indictment is entirely consistent with the settled rule that if the challenged provision of the statute is itself so vague and uncertain as to be repugnant to due process, specification of the details of the offense in the indictment will not serve to validate the statute. "It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression." *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453. See also *Champlin Refining Co.* v. *Corporation Commission*, 286 U.S. 210, 242 (1932). We agree with appellees that it is the adequacy of the statute which must be tested. The difference between appellees and ourselves is that we believe that the statute is constitutional as applied to appellees, and that the judgment below should be reversed if the statute gave

*For the purposes of the Criminal Appeals Act, the particulars are to be considered as limiting the indictment, unless the district court has not so treated them. See *United States* v. *Lem Hoy*, 330 U.S. 724, 725, 730; *United States* v. *Halseth*, 342 U.S. 277, 278–279.

them adequate warning that their conduct (*i.e.*, selling at prices below cost without commercial justification, for the purpose of destroying competition) would render them liable to its penalties; whereas appellees contend, in effect, that, even though they had adequate warning from the statute that they were committing the proscribed offense, nevertheless the statute cannot constitutionally be applied because some other business firm might not be able to determine whether the statute applied to different conduct in a different situation. Appellees' contention is inconsistent with the historic course of constitutional adjudication. The same contention was specifically rejected in *Robinson* v. *United States*, 324 U.S. 282, the only case which raises the point squarely in relation to a claim of unconstitutional vagueness. In that case, when the defendant attacked the constitutionality of the federal kidnapping statute by arguing that its meaning was uncertain as applied to various hypothetical cases, the Court rejected the argument upon the ground that there was no uncertainty in the application of the statute to the defendant's conduct saying (p. 286)—

> We do not know what provision of law, Constitutional or statutory, gives us power wholly to nullify the clearly expressed purpose of Congress * * * because of a doubt as to the precise congressional purpose in regard to hypothetical cases that may never arise.

The contrary argument appears to rest upon a play upon words. Where a statute or municipal ordinance purports to regulate the exercise of the right to freedom of speech and the press, the Court has made an exception to the general principle and determined the constitutionality of the statute or ordinance "on its face" by examining its possible applications without confining the inquiry to the constitutionality of the statute as applied to the particular litigant. The reason is, "The existence of such a statute, which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview." *Thornhill* v. *Alabama*, 310 U.S. 88, 97–98. See also *Hague* v. *C.I.O.*, 307 U.S. 496; *Lovell* v. *Griffin*, 303 U.S. 444. The Court has also spoken of examining the statute "on its face" in pointing out that whether a defendant had reasonable notice of what conduct would subject him to penalties depends upon the vagueness or certainty of the statute and not upon the degree of precision with which the indictment charges a crime. *E.g.*, *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453; *United States* v. *Spector*, 343 U.S. 169, 171. The two problems are dissimilar except in those instances in which the statute attacked as void for vagueness is in the area of First Amendment liberties. The reasons for the *Thornhill* doctrine have no application to economic regulation whether the statute be attacked for vagueness or another alleged defect.

Nothing in the Criminal Appeals Act requires a different conclusion. On direct appeals under the Act, the Court considers "the invalidity or construction" of the statute. In the latter instance it looks to the indictment and any bill of particulars in deciding whether the indictment charges a crime under the statute properly construed. By analogy it is entirely proper to look to the indictment and follow the normal rule of constitutional adjudication in passing upon the validity of the statute, *i.e.*, its validity as applied to the acts charged in the indictment. The construction put upon the indictment by the district court is conclusive (*United States* v. *Borden Co.*, 308 U.S. 188), but contrary to appellee's contention neither the prosecutor nor the district court put upon this indictment an interpretation contrary to the construction we now urge.

Since the proscription of sales at "unreasonably low prices" for the purpose of destroying competition in Section 3 of the Robinson-Patman Act gave appellees adequate warning that making sales at prices below cost, not with adequate commercial justification but for the purpose of destroying competition, would render them liable to the statutory penalties, their prosecution and conviction for engaging in such conduct cannot deprive *them* of liberty or property without due process of law, regardless of whether the statute can constitutionally be applied to predatory pricing in other forms.

CONCLUSION

The judgment of the district court dismissing counts 2, 4, 6, 8, 10, 13, and 15 should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

NO. 18

UNITED STATES OF AMERICA, *Appellant*

v.

NATIONAL DAIRY PRODUCTS CORPORATION

and

RAYMOND J. WISE, an individual, *Appellees*

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI

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INDEX

	PAGE
Question Presented	1
Statement	2
Summary of Argument	4
I. The "Unreasonably Low Prices" Clause of Section 3 of the Robinson-Patman Act Is Unconstitutionally Vague	8
A. The Language of the "Unreasonably Low Prices" Provision Is Intrinsically Vague	11
B. The "Unreasonably Low Prices" Clause Received Almost No Attention in Congress and Its History Does Not Clarify Its Meaning or Indicate Its Purpose	13
C. The Vagueness of the "Unreasonably Low Prices" Clause Is Increased by Its Incongruity With the Other Provisions of the Robinson-Patman Act and With Antitrust Policy	23
D. The Government's Proposed Meanings for the "Unreasonably Low Prices" Clause Have No Support in the Language, History or Context of the Statute and, Even if Adopted, Would Be Too Indefinite	28
1. The Government's General "Rational Businessman" Test Is as Indefinite as the Language of the Statute	30
2. A Prima Facie Presumption That Sales Below Cost Are Unreasonable Is Unsupportable	33
3. Even If "Selling Below Cost" Were Treated as an Equivalent of "Unreasonably Low Prices," the Statute Would Be Unconstitutionally Vague Because of Lack of Any Definite Rules for Interpreting and Applying It on a "Cost" Basis	39

PAGE

a. Whose Cost Is Relevant? 40

b. What Costs Are Relevant? 42

c. How Are the Relevant Costs To Be Determined and Allocated? 48

d. Actual Costs Are Often Unascertainable in Advance of Sale, and Books Kept in the Ordinary Course of Business Do Not Provide the Cost Information Needed 52

II. The Decisions of This Court Demonstrate That a Prohibition of "Unreasonably Low Prices" Is Not Sufficiently Definite To Satisfy Constitutional Requirements 55

A. The Constitutional Invalidity of a Reasonableness Test for Price Is Established by a Long and Consistent Line of Constitutional and Antitrust Decisions of This Court 55

B. Decisions Relied Upon by the Government Do Not Involve Situations Analogous to the "Unreasonably Low Prices" Clause 63

C. The Statute's Failure To Make the Act Proscribed Ascertainable Is Not Remedied by Its Requirement of a Specific Intent 73

III. The Issue Before the Court Is the Constitutionality of the Prohibition of "Unreasonably Low Prices," and Not of "Sales Below Cost" 77

A. The Indictment Is Not Limited to "Sales Below Cost" 78

B. The Language of the Statute, Not of the Indictment, Must Be Tested 82

Conclusion 87

CITATIONS

CASES

Alabama State Fed'n of Labor v. McAdory, 325 U.S. 450 (1945) 86

American Seeding Mach. Co. v. Kentucky, 236 U.S. 660 (1915) 60

American Tel. & Tel. Co. v. United States, 299 U.S. 232 (1936) 62

American Tobacco Co. v. United States, 328 U.S. 781 (1946) 24

Automatic Canteen Co. v. FTC, 346 U.S. 61 (1953) 48, 53

Balian Ice Cream Co. v. Arden Farms Co., 94 F. Supp. 796 (S.D. Cal. 1950) 52

Bandini Petroleum Co. v. Superior Court, 284 U.S. 8 (1931) 67

Barrows v. Jackson, 346 U.S. 249 (1953) 86

Ben Hur Coal Co. v. Wells, 242 F.2d 481 (10th Cir. 1957) 36

Boyce Motor Lines, Inc. v. United States, 342 U.S. 337 (1952) 66, 77

Champlin Ref. Co. v. Corporation Comm'n, 286 U.S. 210 (1932) 61, 84

Cline v. Frink Dairy Co., 274 U.S. 445 (1927) 57, 58, 60, 65, 66, 67, 68, 70, 74, 86

Collins v. Kentucky, 234 U.S. 634 (1914) 60

Connally v. General Constr. Co., 269 U.S. 385 (1926) 7, 8, 9, 55, 61

Cramp v. Board of Pub. Instruction, 368 U.S. 278 (1961) 74, 82, 83, 84

Eastern R.R. Presidents Conference v. Noerr Motor Freight, 365 U.S. 127 (1961) 27

PAGE

F. & A. Ice Cream Co. v. Arden Farms Co., 98 F. Supp. 180 (N.D. Cal. 1951) 52

FTC v. Anheuser-Busch, Inc., 363 U.S. 536 (1960) ..24, 25

FTC v. Morton Salt Co., 334 U.S. 37 (1948) 25

FTC v. Standard Oil Co., 355 U.S. 396 (1958) 41

Herndon v. Lowry, 301 U.S. 242, 263 (1937) 67

Hygrade Provision Co. v. Sherman, 226 U.S. 497 (1925) 75

International Harvester Co. v. Kentucky, 234 U.S. 216 (1914) 59, 60, 69, 70

Jordan v. DeGeorge, 341 U.S. 233 (1951) 66

Kennington v. Palmer, 255 U.S. 100 (1921) 57

Kinnane v. Detroit Creamery Co., 255 U.S. 102 (1921) 57

Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959) 69

Koehler v. United States, 342 U.S. 852 (1951) 75

Lanzetta v. New Jersey, 306 U.S. 451 (1939) 84

Edgar A. Levy Leasing Co. v. Siegel, 258 U.S. 242 (1922) 64

Malone v. Kentucky, 234 U.S. 639 (1914) 60

Massachusetts v. Mellon, 262 U.S. 447 (1923) 82

McGowan v. Maryland, 366 U.S. 420 (1961) 66

Miller v. Oregon, 273 U.S. 657 (1926) 66

Mitchel v. Reynolds, 1 P. Wms. 181, 24 Eng. Rep. 347 (K.B. 1711) 68

Moore v. Mead's Fine Bread Co., 348 U.S. 115 (1954) 24

Musser v. Utah, 333 U.S. 95 (1948) 61

Nash v. United States, 229 U.S. 373 (1913) 59, 67, 70

PAGE

Nashville Milk Co. v. Carnation Co., 355 U.S. 373 (1958) 10, 11, 43, 52, 60, 67, 73

Northern Pac. Ry. v. United States, 356 U.S. 1 (1958) 69

Oglesby Grocery Co. v. United States, 255 U.S. 108 (1921) 57

Porto Rican Am. Tobacco Co. v. American Tobacco Co., 30 F.2d 234 (2d Cir. 1929) 24

Ratner v. California, 321 U.S. 755 (1944) 66

Robinson v. United States, 324 U.S. 282 (1945) 85

Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951) 21

Screws v. United States, 325 U.S. 91 (1945) 7, 74, 75

A. B. Small Co. v. American Sugar Ref. Co., 267 U.S. 233 (1925) 57, 64, 65

Smith v. Cahoon, 283 U.S. 553 (1931) 61

Sproles v. Binford, 286 U.S. 374 (1932) 66

Standard Oil Co. v. FTC, 340 U.S. 231 (1951) ..25, 26, 41

Standard Oil Co. v. United States, 221 U.S. 1 (1911) 58, 68

State v. Fleming Co., 184 Kan. 674, 339 P.2d 12 (1959) 47

Tedrow v. A. T. Lewis & Son Dry Goods Co., 255 U.S. 98 (1921) 57

Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907) 62

Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951) 69

United Pub. Workers v. Mitchell, 330 U.S. 75 (1947) 86

United States v. Alford, 274 U.S. 264 (1927) 83

PAGE

United States v. Addyston Pipe & Steel Co., 85 Fed. 271 (6th Cir. 1898) 67, 69

United States v. American Tobacco Co., 221 U.S. 106 (1911) 24

United States v. Borden Co., 308 U.S. 188 (1939) 81

United States v. Classic, 313 U.S. 299 (1941) 83

United States v. Cardiff, 344 U.S. 174 (1952) 61, 76, 80

United States v. L. Cohen Grocery Co., 255 U.S. 81 (1921) 7, 55, 57, 58, 59, 60, 64, 65, 67, 68, 70, 72, 74, 83

United States v. Corn Products Refining Co., 234 Fed. 964 (S.D.N.Y. 1916) 24

United States v. Evans, 333 U.S. 483 (1948) 83

United States v. Fairmont Foods Co., Cr. No. 3634, W.D. Mich., June 23, 1959 11

United States v. Five Gambling Devices, 346 U.S. 441 (1953) 83

United States v. Harriss, 347 U.S. 612 (1954) 83, 85

United States v. Jones, 345 U.S. 377 (1953) 82

United States v. Kahriger, 345 U.S. 22 (1953) 83

United States v. McKesson & Robbins, 351 U.S. 305 (1956) 21

United States v. Parke, Davis & Co., 362 U.S. 29 (1960) 21

United States v. Pennsylvania R.R., 242 U.S. 208 (1916) 61

United States v. Petrillo, 332 U.S. 1 (1947) 65, 66, 72, 73, 83

United States v. Radio Corp. of America, 358 U.S. 334 (1959) 62

PAGE

United States v. Ragen, 314 U.S. 513 (1942) 63, 66, 71, 72, 73

United States v. Raines, 362 U.S. 17 (1960) 86

United States v. Shreveport Grain & Elevator Co., 287 U.S. 77 (1932) 61, 76, 83

United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) 27, 59, 62, 68, 69, 70

United States v. Spector, 343 U.S. 169 (1952) 66, 83, 84

United States v. Trenton Potteries Co., 273 U.S. 392 (1927) 27, 58, 68

United States v. Winslow, 227 U.S. 202 (1913) 81

United States v. Wurzbach, 280 U.S. 396 (1930) 77, 83

C. A. Weed & Co. v. Lockwood, 255 U.S. 104 (1921) 57

Weeds v. United States, 255 U.S. 109 (1921) 57

G. S. Willard Co. v. Palmer, 255 U.S. 106 (1921) 57

Winters v. New York, 333 U.S. 507 (1948) 7, 84

TEXTS

ADVISORY COMMITTEE ON COST JUSTIFICATION, REPORT TO THE FEDERAL TRADE COMMISSION (1956); CCH, COST JUSTIFICATION REPORT, TEXT OF REPORT TO THE FEDERAL TRADE COMMISSION BY THE ADVISORY COMMITTEE ON COST JUSTIFICATION (1956) 48, 49

ATT'Y GEN. NAT'L COMM. ANTITRUST REP. (1955) 10, 21, 68

Clark, *Statutory Restrictions on Selling Below Cost*, 11 VAND. L. REV. 105 (1957) 51

Comment, *Federal Remedies Available Against One Who Sells at Unreasonably Low Prices*, 9 N.Y.U. INTRA. L. REV. 239 (1954) 10

PAGE

Comment, *The Meaning and Judicial Interpretation of Section 3 of the Robinson-Patman Act*, 49 Nw. U.L. Rev. 273 (1954) 10

Comment, 55 Mich. L. Rev. 845 (1957) 10, 60

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Note, 100 U. Pa. L. Rev. 1058 (1952) 10

Note, 108 U. Pa. L. Rev. 116 (1959) 10

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Statutes

Ark. Stat. tit. 70, ch. 3, § 70-303 (1947) 46

Clayton Act, as amended by the Robinson-Patman Act, Section 2 (Section 1 of the Robinson-Patman Act) 49 Stat. 1526-28 (1914), 15 U.S.C. § 13 (1959) ... .2, 21, A-1, -2, -3, -4

Criminal Appeals Act, 34 Stat. 1246 (1907), 18 U.S.C. § 3731 (1958) 81, 82

PAGE

Robinson-Patman Act, Section 3, 49 Stat. 1528 (1936), 15 U.S.C. § 13a (1959) ..... *passim*, A-4, 5

Sherman Act, 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1 *et seq.* (1959) 21

Federal Trade Commission Act, 38 Stat. 717 (1914), 15 U.S.C. § 41, *et seq.* (1959) 21

25 & 26 Geo. 5, c. 56, § 9 (1935) 14

8 & 9 Eliz. 2, c. 45, § 21 (1960) 14

MISCELLANEOUS

Hearings on H.R. 10235 Before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 86th Cong., 2d Sess. (1960) 43, 44, 45

Hearings on S. 4171 Before a Subcommittee of the Senate Judiciary Committee, 74th Cong., 2d Sess. (1936) 14, 19, 20

H.R. REP. No. 2951, 74th Cong., 2d Sess. (1936) 16

80 CONG. REC. (1936)

3112 17
6286 20
6287 20
6332 17
6333 17
6334 17
6336 17
6346 17
8227 18
8228 18
8229 20
9416 17
9419 ..... 18, 26

2 TRADE REG. REP. ¶ 6571, *et seq.* 45, 46

4 TRADE REG. REP. 35,001 (1962) 45

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

NO. 18

UNITED STATES OF AMERICA, *Appellant*

v.

NATIONAL DAIRY PRODUCTS CORPORATION

and

RAYMOND J. WISE, an individual, *Appellees*

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI

BRIEF FOR APPELLEES ON REARGUMENT

This brief is submitted on behalf of appellees for purposes of the reargument of this case in substitution for appellees' original brief. The brief answers the new brief submitted by the Government.

QUESTION PRESENTED

The question presented by this appeal is whether the "unreasonably low prices" clause of Section 3 of the Robinson-Patman Act is unconstitutionally vague. The clause in issue states:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, . . . to

sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor." (49 Stat. 1528 (1936), 15 U.S.C. § 13a (1959).)

The texts of Sections 1 (Section 2 of the Clayton Act) and 3 of the Robinson-Patman Act are reprinted in the Appendix to this brief.

STATEMENT

Seven counts of the fifteen-count indictment charge that the corporate defendant, National Dairy Products Corporation, sold milk "at unreasonably low prices for the purpose of destroying competition . . . in violation of Section 3" (Counts Two, Four, Six, Eight, Ten, Thirteen, and Fifteen, R. 8-9, 12-13, 15-16, 18-19, 22-23, 28-29 and 32-33).[1] One of these counts (Thirteen) makes the same charge against the individual defendant, Raymond J. Wise. Each count also contains an additional paragraph alleging by way of illustration that sales were intentionally made to distributors "at prices below National's cost."

The defendants moved to dismiss these counts on the ground that they rest upon a statutory provision which is so vague as to be contrary to the due process requirements of the Fifth Amendment and to the requirement of the Sixth Amendment that defendants in criminal cases be adequately informed of the accusations against them (R. 52, 68, 71). In an oral opinion the court held that the Robinson-Patman Act counts were based upon a statutory pro-

1. In this brief, the abbreviation "R." refers to the printed Transcript of Record herein, and the abbreviation "G.B.R." refers to the Government Brief on Reargument.

vision which is unconstitutionally "vague and indefinite" (R. 121-22). An order of dismissal was entered, finding the clause of Section 3 "so vague, indefinite and uncertain as to violate the Fifth and Sixth Amendments to the Constitution of the United States" (R. 122-23).

The decision was not an off-hand ruling (R. 87, 90, 121), as the Government seems to imply (G.B.R. 1, 6). Briefs were filed by both the defendants and the Government, and there was extensive oral argument (R. 86-121).

During the oral argument, the trial judge asked whether the charges of the indictment were limited to charges of sales below cost, and was told by Government counsel that they were not (R. 114-16). In view of the language of the indictment and of the interpretation placed upon it by Government counsel, the court in dismissing the indictment construed the charges as being as broad as the language of the statute.

In its Notice of Appeal the Government broadly described the indictment as charging sales at "unreasonably low prices" and stated that the question presented by the appeal is whether prohibition "of unreasonably low prices for the purpose of destroying competition or eliminating a competitor" is unconstitutionally vague (R. 124-25). In its brief, however, the Government has sought to limit the question to whether the statutory clause "as applied to sales made below cost with such purpose" is unconstitutionally vague and indefinite (G.B.R. 3). The brief contends that the relevant counts of the indictment charge only sales below cost, and that even if the language of the statute considered broadly is too vague, it is constitutional at least as applied to such sales.

SUMMARY OF ARGUMENT

I

The "unreasonably low prices" clause is void, because it creates a crime without an intelligible standard for determining guilt. Lacking any definitions, the clause threatens every seller of goods in commerce with criminal guilt for selling at prices which are too low in terms of dollars and cents, but does not provide any means of determining in advance the point at which the seller's price will become illegal. The incongruity of this vague criminal prohibition in the context of the vigorous price competition expected by fundamental antitrust policy increases the intrinsic uncertainty of its meaning. It is natural, therefore, that the "unreasonably low prices" clause is generally viewed as of dubious constitutionality among students of the subject and has already been denominated "vague" by the Court.

The history of this clause fails to supply a meaning for it and in fact greatly increases uncertainty as to the intent of Congress. Copied hastily and verbatim from a Canadian law of a year before and introduced in the Senate as a part of the Borah-Van Nuys bill, an intended substitute for the Robinson-Patman bill, the clause was never explained by any committee or member of Congress. Indeed, it appears that the only members of Congress who expressly referred to it were two members of the House who criticized it as being extremely indefinite in meaning. The conclusion is inescapable that enactment of the clause in issue was virtually inadvertent. Had Congress had an affirmative desire to draft legislation dealing expressly with known problems involving low prices, it would certainly have used far more

specific language and provided far more definite standards and procedures.

The Government agrees that proof of sales at "unreasonably low prices" is an element of the crime which is separate and distinct from proof of "purpose of destroying competition." Accordingly, proof of the requisite purpose cannot be used to give meaning to the otherwise unintelligible concept of "unreasonably low prices." As the Government has quite correctly pointed out, Congress did not rely upon the "purpose" element alone because such a test would jeopardize all vigorous price competition. (G.B.R. 18.)

In an attempt to supply meaning to the clause, which it admits would be difficult for one well versed in the English language to understand, the Government has offered a broad "rational businessmen" test, and a narrower test based on selling "below cost." Upon examination, the board test is as undefined as the statute and, because of its meaningless verbiage, even more confusing. The seemingly narrower contention is no more satisfactory, since selling "below cost" cannot be treated as always equivalent to selling at "unreasonably low prices." The Government attempts to solve this dilemma by calling such sales prima facie unreasonable and requiring the seller to justify them. The result would be to force defendants to try to supply the meaning that neither the statute nor the Government can provide. The Government's "sales below cost" theory is also objectionable because, unless carefully defined, "cost" does not supply a meaningful standard for the advance determination of prices.

The insuperable difficulties in stating a plausible mean-

ing for this clause are illustrated by the serious inconsistencies into which the Government has been drawn in its brief. At one point, the Government states that some prices which are above cost may be illegal, while stating later that one who keeps his price above cost will be safe. Yielding to necessity, the Government acknowledges that there are large numbers of situations in which sellers ordinarily do and should be allowed to sell "below cost," yet it would at the same time call all "below cost" sales "prima facie" illegal. The Government would make selling "below cost" a decisive test, yet it asserts that it is not necessary to have any statutory definition or standards for what is meant by "cost" and how to determine it. It agrees that "unreasonably low prices" and illegal purpose are separate elements of the statutory offense, yet its final position is that the presence of both should be presumed from the mere fact of selling "below cost," which in turn should be presumed from the seller's books, regardless of the accounting methods by which they were kept. These and other shifts in position are the inevitable consequence of trying to instill meaning into a clause which inherently defies any consistent intelligible expression.

Since this case is, as the Solicitor General has said, very nearly the first case under this clause, it is hardly the important antitrust provision that the Government's present brief asserts it to be. Indeed, it is difficult to see how invalidation of the "unreasonably low prices" clause could have any effect at all on antitrust enforcement.

II

A fundamental constitutional principle, under both the due process clause of the Fifth Amendment and the notice

requirement of the Sixth, is that statutory "crime s 'must be defined with appropriate definiteness.' . . . There must be ascertainable standards of guilt." *Winters v. New York*, 333 U.S. 507, 515 (1948). This important civil right, which is "consonant alike with ordinary notions of fair play and the settled rules of law . . ." *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926), is transgressed by the "unreasonably low prices" clause. This is the clear holding of a long and undeviating line of Supreme Court precedent. Indeed, the criminal proscription against "unreasonably low prices" in issue here is substantially identical to the provision of the Lever Act, prohibiting the wilful making of unreasonable rates and charges, which the Court voided because it did not provide "an ascertainable standard of guilt . . ." *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921).

The same conclusion has since been reached with respect to many criminal statutes legally indistinguishable from the one at issue. The vagueness of "reasonableness" as a measure of prices has resulted in consistent refusal on the part of this Court, and of courts generally, to make judicial determinations, under any statute or other rule of law, of the "reasonableness" of prices charged in any segment of our competitive economy.

The specification of intent found in the "unreasonably low prices" clause adds to its uncertainty and therefore does not remove the constitutional objections. The Government concedes that the intent requirement here is a separate element and that it differs from the willfulness requirement involved in, for example, *Screws v. United States*, 325 U.S.

91 (1945), and that, even if it did not, "willful conduct cannot make definite that which is undefined" (325 U.S. at 105).

The Government now concedes that "it is the adequacy of the statute which must be tested" and that it is the "settled rule that if the challenged provision of the statute is itself so vague and uncertain as to be repugnant to due process, specification of the details of the offense in the indictment will not serve to validate the statute" (G.B.R. 48). But, paradoxically, it continues to urge that the statute should be tested, not on its face, but only as applied in the indictment, and that the indictment here is limited to allegations of "sales below cost." Appellees' answer is two-fold. It is clear from all of the decisions of this Court involving the "vagueness" doctrine that it is the "terms of the penal statute" which "must be sufficiently explicit" to meet constitutional requirements of certainty. *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). Accordingly, a statute challenged for vagueness must, and heretofore always has been, tested on its face. But even if the rule of law were as the Government states it, it would be immaterial here because the indictment in this case, couched in the language of the statute, was interpreted below, and must be considered for purposes of this appeal, as containing charges as broad in scope as the statute itself.

I. THE "UNREASONABLY LOW PRICES" CLAUSE OF SECTION 3 OF THE ROBINSON-PATMAN ACT IS UNCONSTITUTIONALLY VAGUE.

The "unreasonably low prices" clause of Section 3 of the Robinson-Patman Act makes it a crime "to sell, or contract

to sell goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor" (49 Stat. 1528 (1936), 15 U.S.C. § 13a (1959)). The statute contains no definitions. Yet it provides for penalties of both fine and imprisonment for persons found guilty of transgressing its vague generalities. (See Appendix to this brief.)

The court below held, and it is our position on this appeal, that the Fifth and Sixth Amendments to the Constitution require substantially more definiteness for criminal prohibitions than this provision possesses. Every person is entitled to be notified, in advance and by the language of the statute, of the conduct made criminal in order that he may comply.

This definiteness requirement is a civil right of fundamental importance. A key protection for private citizens against arbitrary criminal prosecution and punishment, it has been carefully guarded by the decisions of the Court. One of its classic statements, in *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926), is representative of the long line of decisions before and since that case:

> "That the terms of the penal statute . . . must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

The "unreasonably low prices" clause through the years has acquired among students of the subject a general repu-

tation for dubious constitutional status. The *Report of the Attorney General's National Committee to Study the Antitrust Laws* 261 (1955) concluded:

> "Doubts besetting Section 3's constitutionality seem well founded; no gloss imparted by history or adjudication has settled the vague contours of this harsh criminal law."

The same doubts have beset writers who have specifically studied the "unreasonably low prices" clause and the question of its constitutional validity. Comment, 55 *Mich. L. Rev.* 845, 855 (1957); Comment, *Federal Remedies Available Against One Who Sells At An Unreasonably Low Price*, 9 *N.Y.U. Intra. L. Rev.* 239, 242-44 (1954); Note, 100 *U. Pa. L. Rev.* 1058, 1061-62 (1952); Comment, *The Meaning and Judicial Interpretation of Section 3 of the Robinson-Patman Act*, 49 *Nw. U.L. Rev.* 273, 292-93 (1954); Note, 108 *U. Pa. L. Rev.* 116, 122 (1959).

Indeed, the Court has taken notice of the glaring imprecision of this clause. In *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373 (1958), it premised its decision that Section 3 is not one of the antitrust laws, and therefore not a proper basis for private antitrust suits, in part on the indefiniteness and uncertainty obviously inherent in the "unreasonably low prices" clause, which the Court, per Mr. Justice Harlan, termed "this vague provision" (see full discussion at pp. 61, *infra*).

The Government makes the surprising statement that the clause in issue is an important part of the antitrust laws (G.B.R. 12). But in his original argument on this appeal, the Solicitor General admitted that this is very nearly the

first case to be brought by the Government under this twenty-six year old criminal provision. As recently as 1958, the Court noted in the *Nashville Milk* case that, as far as it could find, the Department of Justice had never made any attempt to use or enforce the "unreasonably low prices" provision (335 U.S. at 378 n.7). The unavailability of this clause to private litigants, its almost complete nonuse by the Government, and its unintelligibility as a guide to business insure that its complete disappearance will not affect antitrust enforcement in the least.

A. The Language of the "Unreasonably Low Price" Provision Is Intrinsically Vague.

The Government concedes that "a stranger well versed in the English language . . . would have difficulty in determining the meaning of the relevant phrases" of this law (G.B.R. 25). It will be shown that this statement is equally true for the sellers who must try to comply with the statute and the courts and juries who might be required to apply it.

The parties are in agreement that three elements of the offense are abstractly outlined by the language of the provision in issue. It must be shown that there was: (1) a sale, or contract for sale, of goods; (2) at "unreasonably low prices"; (3) done "for the purpose of destroying competition or eliminating a competitor" (G.B.R. 11). These are separate and distinct elements, as the Government brief correctly points out, and "unreasonably low prices" and illegal purpose must be separately proved (G.B.R. 20). A violation

2. In fact, we know of only one other indictment brought under this clause, United States v. Fairmont Foods Co., Cr. No. 3634, W.D. Mich., June 23, 1959.

of this clause is not established, we agree, even if it is proved that a seller has sold goods at low prices with the specific purpose of destroying competition. Clearly there must be an additional demonstration that the prices were not only "low," but "unreasonably" low (G.B.R. 18, 20).

The constitutional issue of vagueness of the phrase, "unreasonably low prices," accordingly must be faced independently of whether the "purpose" phrase may be considered sufficiently clear. It follows that the statute's requirement of a purpose to eliminate competition cannot be used to solve doubts and ambiguities about what is meant by "unreasonably low." We also agree with the Government that the most critical problem of vagueness arises as to the phrase "unreasonably low" (G.B.R. 11).

That phrase seeks somehow to put an individual floor under every price charged by every seller of goods in commerce in the United States. Unlike the rest of the Robinson-Patman Act, there is no requirement that the "unreasonably low prices" be accompanied by discrimination. A price statute with less definiteness would be difficult to design. Obviously, no seller can ascertain from this language, no matter how long he might reflect upon it, what his price should be in dollars and cents. Yet sellers must be able to determine with reasonable certainty how low in price they may go without committing a crime, and, under the constitutional requirement of definiteness, they are entitled to know how to do this.

The "purpose" phrase of the statute is also seriously ambiguous, and we cannot accept the Government's assertion that its meaning is "too plain for discussion" (G.B.R. 11).

As the Government itself points out later, because this phrase standing alone is so ambiguous that it would endanger desirable price competition, rather than protect it, Congress did not rely upon it to distinguish between lawful and unlawful prices (G.B.R. 18). Thus, both the "purpose" and the "unreasonably low prices" phrases lack intelligible meaning on their face.

Indeed, whatever meaning and standards the Government claims for this statute are not to be found in the language but are only purported derivations from history, context, and custom. These far-reaching attempts to borrow a meaning for the clause from some extraneous source have been coupled with repeated shifts of basic position ever since the Notice of Appeal. Plainly the Government is finding the "task to make it yield sense" to be, as Representative Celler predicted, truly "herculean" (see p. 18, *infra*).

Because of the position the Government has taken in its revised brief, we turn immediately to these supposed sources of statutory meaning, and in the remainder of this section will show that, far from clarifying the statutory language, the language is in fact incongruous in these contexts. The actual effect is to make the disputed language even more inscrutable than it might at first reading appear to be.

B. The "Unreasonably Low Prices" Clause Received Almost No Attention in Congress and Its History Does Not Clarify Its Meaning Or Indicate Its Purpose.

The vagueness of the "unreasonably low prices" provision is not reduced by reference to its history as the Government

brief intimates (G.B.R. 18, 25). On the contrary, complete study of the history of the enactment of this clause in 1936 reveals that there was practically no discussion whatever in Congress of either its meaning or its purpose, and that it never received any express interpretation by any Congressman responsible for its introduction or enactment. Its vagueness, and the failure of Congress in any way to clarify its meaning, are explained simply by the fact that it was enacted into law with hardly any attention being paid to it in Congress at all.

The language of Section 3, including the clause in issue, was not the product of congressional drafting. Instead, it was copied almost verbatim from a statute passed by the Canadian Parliament in 1935, only a year earlier than the enactment of the Robinson-Patman Act.[3] Thus, unlike other provisions of our antitrust legislation, the language was not drawn from common law or from any prior antitrust legislation or experience of the United States. Moreover, at the time of its enactment by Congress, the Canadian act from which it was copied had received no court interpretation in Canada, and to this date no reported Canadian court case construing its meaning has been found.

The clause was enacted in a tortuous, confusing series

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3. 25 & 26 Geo. 5, c. 56, § 9 (1935). This section, as enacted, was § 498A (later § 412) of the Criminal Code. In amended form, it now appears as § 33A of the Combines Investigation Act (8 & 9 Eliz. 2, c. 45, § 21 (1960)). See *Hearings on S. 4171 Before a Subcommittee of the Senate Committee on the Judiciary*, 74th Cong., 2d Sess. 63 (1936) (hearings on Borah-Van Nuys bill) which are hereinafter cited as "*Hearings.*"

of events.[4] Section 3, which was originally known as the "Borah-Van Nuys bill," was introduced and sponsored in the Senate as a substitute for the original Robinson and Patman bills. The subject matter of all of these bills was price discrimination. The Borah-Van Nuys bill as a whole was given scant discussion, and the "unreasonably low prices" clause, inadvertently interjected into a controversy about how to deal with price discrimination, received virtually no attention.

The Borah-Van Nuys bill was never given hearings by any House committee. The Senate Judiciary Committee nominally held hearings on it, but these actually centered almost entirely on the subject of price discrimination, and far more on the Robinson and Patman bills than on the Borah-Van Nuys bill. None of the 27 witnesses favored the Robinson-Patman proposals, and most endorsed the Borah-Van Nuys bill without enthusiasm and "as a lesser evil."[5] As a result, the Committee filed no report on the bill. Later, however, on the Senate floor, the Borah-Van Nuys bill was added to the Robinson bill by amendment, and both bills went to the Conference Committee along with the House-enacted Patman bill. Unable to compose the differences of competing factions, the Committee failed to choose between the overlapping measures and finally resolved a stalemate by adopting both the Patman and the Borah-Van Nuys bills, as Sections 1 and 3, respectively, of the final ver-

4. The legislative history is described in ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 11-23, 453-59 (Trade Reg. Series, Little, Brown and Co., 1962) and PALAMOUNTAIN, THE POLITICS OF DISTRIBUTION 220-34 (Harvard Univ. Press, 1955) (Harvard Political Studies, published under the direction of the Department of Government in Harvard University).

5. ROWE, *op. cit. supra* note 4, at 455.

sion of the Robinson-Patman Act.[6] It is well known that the bills were not intended to be complementary and that passage of both bills was not the original desire of the sponsors of either.

In its report, which is the only committee report to mention Section 3 at all, the Conference Committee devoted only one paragraph to Section 3 as a whole, and the "unreasonably low prices" clause was not even mentioned. That paragraph (set forth in full in the note below) indicated that the function of the section generally was merely to add criminal penalties to substantially the same violations as those already covered in Section 1.[7]

6. PALAMOUNTAIN, *op. cit. supra* note 4, at 228.

7. The entire statement on Section 3 (the Borah-Van Nuys bill) in the Conference Committee report was as follows:

"SECTION 3

"Subsection (h) of the Senate amendment, which was not contained in the House bill, was accepted by the House conferees, and, except for the paragraph relating to cooperatives, separately treated in section 4 below, appears in the conference report as section 3 of the bill itself. It contains the operative and penal provisions of what was originally the Borah-Van Nuys bill (S. 4171). While they overlap in some respects, they are in no way inconsistent with the provisions of the Clayton Act amendment provided for in section 1. Section 3 authorizes nothing which that amendment prohibits, and takes nothing from it. On the contrary, where only civil remedies and liabilities attach to violations of the amendment provided in section 1, section 3 sets up special prohibitions as to the particular offenses therein described and attaches to them also the criminal penalties therein provided.

"Section 3 also makes it possible for the person subjected to a discrimination prohibited therein to cause the offender to be prosecuted in the Federal court of the district in which such violation is committed." (H.R. REP. No. 2951, 74th Cong., 2d Sess. 8 (1936)).

Not only was the "unreasonably low prices" clause not mentioned in any committee report, but nowhere in the debates in either House was there any explanation of it by any sponsor. In fact we have found no express reference to the clause at all by anyone in the Senate.[8] In the House, only

8. In none of the Government's citations to the debates (G.B.R. 16) is there any discussion of the "unreasonably low prices" clause, and some of the statements made actually negate any intention to interfere with price reductions: Senator Logan, who was floor manager for the Robinson bill (at 80 CONG. REC. 3112, 3113 (1936)), was discussing only the Robinson bill; the Borah-Van Nuys bill had not yet even been introduced. Later (at 80 CONG. REC. 6332 (1936)), Senator Logan again was not discussing the "unreasonably low prices" clause, but was arguing that the Robinson-Patman bill was needed to strengthen the original Section 2 of the Clayton Act, which contained a broad privilege of discriminatory price cutting to meet competition. Congressman Utterback (at 80 CONG. REC. 9416 (1936)) did not mention the "unreasonably low prices" clause, and his remarks concerning price cutting all dealt expressly with the problem of price discrimination.

Senator Borah himself never seems to have referred expressly to the "unreasonably low prices" clause. Although (at 80 CONG. REC. 6346 (1936)) he spoke of the injurious effects of secret allowances and area price cutting, he advocated only control of discrimination, and disavowed attempting to control prices as such. He stated: "the amendment which will be proposed [the Borah-Van Nuys bill] does not undertake to control the question of prices, to fix prices, or to regulate prices. It seeks only to enforce equitable action as to all customers who may be dealing with the party selling the goods."

Senator Logan also contended that nothing in the Robinson bill would interfere with selling at any price desired by the seller, to which Senator Borah added that this is the "fundamental principle of both bills"—to "compel all customers to be treated alike . . ." (80 CONG. REC. 6333 (1936)). Borah stated further that there was nothing in the proposed legislation "which justifies the argument that the bill prevents price reduction" (80 CONG. REC. 6334 (1936)).

two express references to it have been found. One was by Congressman Patman, who strongly opposed the Borah-Van Nuys bill at the outset. He pointed out that "evidently it was very hastily drawn," and called it "very indefinite as to what is an unreasonably low price" (80 *Cong. Rec.* 8227-28 (1936)). The other reference to it was by Congressman Celler, who at one point stated a preference for the Borah-Van Nuys bill, giving the "unreasonably low prices" clause as one reason (*id.* at 8228), but later opposed the entire legislation. In his final remarks, he stated that the law as enacted contained "much of uncertainty," and "many inconsistencies," and that "the courts will have the devil's own job to unravel the tangle." He added: "You have the herculean task to make it yield sense." (80 *Cong. Rec.* 9419 (1936).)

In its attempt to convert the clause into one aimed at "sales below cost", the Government suggests that there is some support in the history for such a theory (G.B.R. 16, 17). On the contrary, however, there is no indication that Congress believed that it was enacting any kind of "sales below cost" prohibition. First, it seems obvious that if "selling below cost" had been the main evil which it intended to remedy, Congress would have used express words to that effect, as have over 30 state legislatures which have acted on this problem (see *infra*, pp. 45-48).

Further, the Senate hearings claimed by the Government to indicate some intention to legislate on selling below cost (G.B.R. 17) actually do not support the inferences drawn at all. Senator Borah, who seems never to have referred expressly to the "unreasonably low prices" clause at any time on the record, did not say that the Borah-Van Nuys

bill was intended to stop "selling at less than cost." In context, he was not referring to selling below cost as such but to discriminatory price cuts.[9] As pointed out above, he denied on the Senate floor that his bill was intended to deal with price reductions as such (*supra*, p. 17 n.8). No Senator expressly referred to the clause in the hearings. No Senator or witness expressly singled out "below cost selling" as a pernicious evil in itself, apart from connection with discrimination, or with the so-called "loss leader" problem. The first two witnesses cited by the Government actually did not refer to the clause in issue.[10] The third (*Hearings* at 64)

9. The passage relied upon by the Government is one in which a witness was arguing in favor of the legality of discriminating in price as a business necessity, while prevention of this kind of discriminatory selling was said, by both Senator Logan and Senator Borah, to be the goal of the proposed legislation of 1936. When Senator Borah made the statement quoted by the government that the bill was intended "to stop that" (G.B.R. 18), he was replying to a statement by the witness who argued that small manufacturers should be allowed to sell at different prices to different customers. (*Hearings* at 53.)

10. At page 14 of the *Hearings*, Senator Logan, seeking support for the Robinson bill's elimination of the old Section 2's meeting competition defense, asked whether chain store use of "loss leader" selling was objectionable, and the witness, a member of the Harvard Business School faculty, answered that the use of "loss leaders" was not confined to chain stores, but was used by other retailers too, a circumstance to which he did not object. The testimony at page 17 consisted of a similar question by Senator Logan to another witness as to whether selling below cost should be permitted to meet competition, with the pointed reply, manifesting no belief in any need for legislation, that one who sells below cost for very long "will undoubtedly go bankrupt."

did not mention sales below cost and, while he suggested that he would favor some provision such as the "unreasonably low prices" clause, he strongly disapproved of one providing criminal penalties.

The other witness cited, and the only one quoted by the Government (G.B.R. 17 n.3), was an attorney who in context was really arguing a constitutional point—that Congress had power to legislate on the "loss leader" problem under the commerce clause, despite the fact that the problem is one of retail pricing (*Hearings* at 85-86). His testimony elicited no comment from the Senators present. Further, such scattered references in the legislative history to "loss leaders" have no relevance because it is clear that Congress did not attempt to legislate on this problem through the Robinson-Patman Act and, in any event, the "loss leader" is a completely different phenomenon from that complained of in the Government brief.[11]

It would be strange indeed if the Government were to imply any resemblance between "loss leaders" and "predatory sales below cost." The Department of Justice obviously does not regard "loss leaders" as an antitrust evil, for it

11. The practice of "loss leader" selling was defined by Congressman Celler in 1936 as the practice used by retailers of selling heavily advertised brands at a loss in order to induce customers to enter their establishments (80 CONG. REC. 8229 (1936)). On the Senate floor, Senator Logan explicitly stated that the legislation which became the Robinson-Patman Act "cannot" deal with that problem (80 CONG. REC. 6286-87 (1936)). Senator Borah evidently agreed. The next year, Congress did deal with that problem by enacting the Miller-Tydings amendment to the Sherman Act, exempting resale price maintenance under certain conditions (26 Stat. 209 (1937)).

vigorously opposes both private and legislative attempts to prevent their use.[12]

The Government's other historical arguments are equally unilluminating as to the "unreasonably low prices" clause. No doubt so-called "predatory pricing" has figured occasionally in antitrust cases and writings. As the Government brief itself shows (G.B.R. 13-16), however, there are two clearly applicable federal antitrust provisions, the Sherman Act and Section 2 of the Clayton Act, which can successfully deal with anti-competitive price-cutting, and the brief neglects to mention a third, Section 5 of the Federal Trade Commission Act. These statutes can apply to such price-cutting when it is accompanied by a combination in restraint of trade or by a danger of monopolization (Sections 1 and 2 of the Sherman Act), or by discrimination (Section 2 of the Clayton Act), or by injurious effect on competition (Section 5 of the Federal Trade Commission Act), all with objective legal standards which have a reasonably well-established meaning. The availability of all these laws in 1936 is strong evidence that the "unreasonably low

12. The Department of Justice and the Federal Trade Commission historically have opposed "Fair Trade" legislation designed to prevent "loss leader" sales through legalized resale price maintenance. ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 153 (1955). The Government has also prosecuted under the Sherman Act sellers who undertake to prevent "loss leader" sales by activities outside the ambit of Fair Trade exemptions. United States v. Parke, Davis & Co., 362 U.S. 29 (1960); United States v. McKesson & Robbins, Inc., 351 U.S. 305 (1956). The Court itself has been alert to condemn the use of court process to enjoin such selling in the absence of a clear exemption. Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951). The Government obviously does not regard "loss leader" selling as unreasonable.

prices" clause was not designed to deal with any clearly-perceived problem of selling below cost.

The Government's intimation, as an excuse for the statute's vagueness, that Congress could not have used more definite language to deal with the supposed evil (G.B.R. 37-38), is thus hollow indeed. If three existing antitrust statutes were thought insufficient, there were other alternatives available to Congress in 1936 to deal with any supposed pricing problem. Congress might have employed the approach adopted by many state legislatures which have enacted "Unfair Practices Acts," using much more specific pricing standards and utilizing statutory definitions to supply guidance (see discussion *infra*, pp. 45-48). When Congress has sought to provide control of prices for regulated industries, it has endowed administrative agencies with the power to designate specific rates and prices with the utmost clarity. With respect to unregulated businesses, after the Lever Act of World War I, which was unconstitutional because it adopted the same approach as the provision in question (see discussion *infra*, pp. 55-58), Congress in World War II designated an administrative agency to administer prices. It is not suggested that in 1936 Congress actually believed there was any need for such measures since, as pointed out above, there is no reliable basis for ascertaining what Congress really intended. But if a reasonably clear and definite basis for the control of low prices was desired, constitutional means were at hand. They were certainly not utilized in the "unreasonably low prices" clause.

What history teaches is that Congress gave no real consideration to the borrowed words of the "unreasonably low prices" clause and allowed it to slip into the statutes unaccompanied by any explanation of its enigmatic phraseology.

C. The Vagueness of the "Unreasonably Low Prices Clause" Is Increased by Its Incongruity With the Other Provisions of the Robinson-Patman Act and With Antitrust Policy.

The clause in issue, unexplained by its history, becomes incongruous when it is placed in the context of the Robinson-Patman Act and of antitrust policy as a whole. This incongruity makes it all the more unfathomable.

The clause is confusing when related to the remainder of Section 3 of the Robinson-Patman Act, of which it is a part (see Appendix to this brief). The whole section bears the heading of "discrimination," and the first two of its three clauses both deal with discrimination, the first clause relating to discrimination between competing purchasers, and the second to geographical price discrimination. The natural expectation created by this context is that the third clause also would deal with discrimination, an impression made stronger by the fact that all of the clauses constitute a single sentence, separated only by semicolons, and that all have a single subject, grammatically speaking.

The indictment itself reflects the uncertainty of the grand jury as to whether some kind of discrimination is required. Each Robinson-Patman Act count contains a paragraph alleging that National "utilized the advantages it possesses by reason of the fact that it operates in a great many different geographical localities in order to finance and subsidize a price war . . ." (*e.g.*, R. 9). This language is indicative of a geographical price discrimination theory—*i.e.*, that defendants "subsidized" low prices in one market by charging higher prices elsewhere. This aspect of the charge is thus a confusingly vague version of the second clause of the act, but without ever directly charging the defendants with discrimination.

The Government brief continually confuses the "unreasonably low prices" provision with the subject of price discrimination. The brief contends that in passing the original Section 2 of the Clayton Act in 1914 Congress intended to legislate on "unreasonably low prices" (G.B.R. 14). But the original Section 2 dealt solely with *discrimination* in prices, and the House Report which is quoted in the brief shows this on its face (*ibid.*).

The cases cited by the Government do not illustrate past recognition of problems of "unreasonably low prices" apart from discrimination or other independent antitrust violations. *Porto Rican Am. Tobacco Co. v. American Tobacco Co.*, 30 F.2d 234, 237 (2d Cir. 1929) cited at G.B.R. 13), plainly was not a mere low price case. It was brought under the original price discrimination provisions of Section 2 of the Clayton Act and is a classic case of geographical discrimination of the kind which may be dealt with in the second clause of Section 3, not the third clause. Also, both *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536 (1960), and *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115 (1954) (cited at G.B.R. 15), arising under the amended Section 2, rested directly upon allegations of area discrimination through selling at prices which were lower in one market than those charged in other markets. The other cases cited by the Government were Sherman Act cases involving charges of conspiracy or monopolization and are even less relevant here.[13]

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13. United States v. American Tobacco Co., 221 U.S. 106, 160-61 (1911); American Tobacco Co. v. United States, 328 U.S. 781, 807 (1946); United States v. Corn Products Refining Co., 234 Fed. 964 (S.D.N.Y. 1916).

Similarly, the legislative history of the Robinson-Patman Act of 1936 shows, as pointed out above, that what concerned Congress was the problem of discrimination. The Government argument that Congress had in mind grave dangers of predatory low pricing by large firms, apart from recoupment of losses through higher prices charged to other customers, is purely gratuitous (G.B.R. 16). If this were important to Congress, it is odd indeed that Congress did not incorporate an "unreasonably low prices" clause in the civil provisions of the act.

Vexatious problems of meaning arise in comparing Section 3's criminal prohibitions with the civil prohibitions of Section 2 of the Clayton Act, as amended (see Appendix to this brief). The "unreasonably low prices" clause has no parallel in Section 2. Further, the prohibitions of Section 2(a) against discrimination in price are expressly qualified by the requirement that adverse effect on competition must be shown. *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948); *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536 (1960). And three important substantive defenses to price discrimination are expressly provided by the statute: (1) cost justification; (2) changing market conditions; and (3) good faith meeting of a competitor's equally low price. *Standard Oil Co. v. FTC*, 340 U.S. 231 (1951).

In contrast, Section 3 makes no provision either for a test of effect on competition or for any of the substantive defenses. This situation is the exact opposite of what would reasonably be expected. Criminal prohibitions customarily are differentiated from civil prohibitions by requiring more, not less, culpable conduct than is required for civil offenses and by providing for more, not less, opportunity to defend.

No doubt this anomolous departure was due to the fact that Section 3 was tacked on to the civil provisions at the last moment without any reconciliation of their substantive differences. The result, in the words of a student of the history of the Robinson-Patman Act, was a "melange of partially incongruous and often vague provisions."[14]

All attempts to reconcile the confusing inconsistencies of these two sections are confronted with the severe problem described by Congressman Celler when the House Conference Report was being discussed in 1936. He stated (80 *Cong. Rec.* 9419 (1936)):

> "In an endeavor to get some sort of an agreement, the so-called Borah-Van Nuys provisions of the Senate bill were grafted onto the House bill, and we have what might be termed in common parlance somewhat of a 'hodgepodge'. . . . When you try to read them both together you have the greatest difficulty. You have the herculean task to make it yield sense."

Finally, grave doubts concerning the meaning of the "unreasonably low prices" clause are greatly deepened when the clause is set down in the broad context of the antitrust policy governing price competition. As pointed out later, the Court has repeatedly refused to substitute the judgment of the courts for that of the market as to the reasonableness of prices. This is because ever since 1890 the Court has adhered to the proposition that the "heart of our national economic policy" is "faith in the value of competition" (*Standard Oil Co. v. FTC*, 340 U.S. 231, 248 (1951)), and that competition in price is so vital a form of competition

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14. Palamountain, The Politics of Distribution 228 (Harvard Univ. Press, 1955).

that it is protected from restraints upon it by the rule of "per se" unreasonableness. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927).

While government may of course impose restraints upon competition which would not be tolerated if privately imposed (*Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961)), private citizens have been taught that vigorous low-price competition is one of our highest economic values. Antitrust policy thus teaches businessmen to believe that the "unreasonably low prices" clause does not mean, as the Government here says it does, that one who competes vigorously by a policy of low prices thereby treads at all times on the borderline of criminal illegality.

When seen in this context, the requirement that an intent to destroy competition, in which the Government brief continually seeks some solution for all of the statute's problems of vagueness inherent in the clause, far from contributing clarity, adds to the difficulty. The intent made suspect differs so little from normal competitive objectives that it may be nearly impossible to differentiate, as the Government has itself pointed out (G.B.R. 18). Businessmen who are fully advised of the consequences of the Government's theory of prima facie violation may well conclude that to be sure of complying with the statute they should reject the ordinary economic objective of price competition. Safety may well seem to lie only in keeping prices at the same level as, or higher than, those of competitors. Even this may not prevent accusation. As this case demonstrates, indictment may follow merely from meeting a competitor's price (R. 37-38).

It is most unlikely that Congress intended any such consequences to flow from this law, and this makes it all the more apparent that what Congress did intend is unascertainable.

D. The Government's Proposed Meanings for the "Unreasonably Low Prices" Clause Have No Support in the Language, History or Context of the Statute and, Even if Adopted, Would Be Too Indefinite.

The vagueness of the language and the lack of any illuminating history have caused the Government to place its main reliance in this appeal upon an attempt to induce the Court to construe the provision in issue to accord with meanings which the Government has itself created out of whole cloth. The tests offered are said to be derived from the "context" of the statute and from the customs and standards of the business community, not from the language of the statute. In its first brief on this appeal, the Government made no effort to defend a general meaning for the "unreasonably low prices" phrase, as such, but confined itself to contending that sales "below cost" are "unreasonably low." The revised brief, at the outset at least, attempts a broader exegesis.

The meaning of the prohibition in issue is characterized broadly by the Government as (G.B.R. 11):

> "sales made with predatory intent at prices so low as to lack a rational foundation in the seller's costs, market conditions, business prospects or exigencies, or other circumstances facing the seller of a kind that an ordinary businessman in the seller's position, but without predatory intent, would take into consideration."

This complex formulation is repeated with variations many times throughout the brief. Bearing no visible resemblance to anything in the statute, it is said to be "compendiously summarized" by the language of Section 3 (G.B.R. 21).

Perhaps recognizing that this sweeping substitution for the words of the statute may not be acceptable, the brief offers the narrower but equally original alternative that (G.B.R. 12):

> "A price below the seller's own costs is unreasonably low, by any normal business standard, in the absence of some extraordinary, identifiable explanation."

Obviously, however, not all prices below cost can be called "unreasonably low prices." As the Government admits (G.B.R. 41-42), there are an abundance of "below cost" situations which Congress could not possibly have meant to treat as "unreasonable," and the statute must distinguish these situations. The statute as actually enacted, however, provides no distinction between good and bad sales below cost because it does not mention sales below cost at all. This gap is sought to be bridged by the expedient of shifting to the defendant the burden of trying to fill in the meaning, requiring him to supply a definiteness which the Government cannot supply. Sales below cost are *presumed* by the Government to be illegal, unless justified by the defendant. The Government's brief states (G.B.R. 10; see also *id.* at 40):

> "*Prima facie* such prices are unreasonably low from the seller's own point of view. No businessman would accept them, absent an intent to destroy competition, unless some specific justification were demonstrated . . . .

> A jury is quite capable of ascertaining by reference to commercial practice whether a defendant's explanation sets forth a rational business reason."

Thus, in the Government's view all it would need to prove to establish a crime would be that the seller sold below his own costs. To the Government, a seller who does this must have either a predatory intent, or a good business reason; it will be up to him to try to prove that it was the latter.

These proposed constructions are not warranted by the language of the statute or by its context. Further, they would not, if adopted, make the statute sufficiently definite.

1. The Government's General "Rational Businessman" Test Is As Indefinite As the Language of the Statute.

The abstract formulation, quoted *supra*, p. 28, with which the Government seeks to fill in the vast blank spaces in the statute's meaning adds nothing to the definiteness of the statute for three reasons;

First, while obscured in verbiage, the "rational businessman" formula literally adds nothing to what the statute says. The formula says that selling at unreasonably low prices with predatory intent means selling at prices which are lower than an ordinary businessman would rationally charge, coupled with predatory intent. It does not delimit what is "reasonable," or what is "rational," in any way. On the contrary, by including as relevant the "seller's costs, market conditions, business prospects or exigencies, or other circumstances facing the seller" (G.B.R. 11), it goes out of its way to hold the door wide for almost every conceivable kind of argument and counter-argument on the subject.

The brief claims that a seller required to follow this formula to avoid committing a crime can "readily identify" the factors to take into account in determining whether his price is too low. The possible factors for him to keep in mind, it states, are: "the seller's costs, both direct and indirect, the opportunity to reduce unit costs by increasing volume, the quality and condition of his goods, the market price or the prices of his competition, the ratio of profit to both gross sales and invested capital, an urgent need to liquidate inventory, *and a host of similar considerations*" (G.B.R. 30-31; emphasis added). These relevant factors of reasonableness, it is said, will vary in relative importance from industry to industry and case to case, but a "rational businessman" will "feel no uncertainty about how to guide his conduct" (G.B.R. 31). The mere quotation of this unlimited array of "relevant factors" demonstrates, however, that the formula does not reduce the vagueness of the statute in one degree.

Second, the formula's "rational businessman" test is a test of what an "ordinary businessman" would "rationally" do in the defendant's position. This would require judging the reasonableness of the prices of one seller by a standard of what the seller's "rational" competitors would have done. Competitors might even be asked to give evidence for the prosecution on what a "rational businessman" would have charged in the defendant's position. Who else would be qualified to testify on this issue? Such an approach is so incongruous in the context of a competitive economy that its very statement by the Government tends to increase rather than reduce the statute's ambiguity.

There are many instances in which rules of law function

well by holding individuals to standards of conduct set by their peers, as for example in the law of torts. But legally required conformity to the pricing standards set by a seller's competitive peers is a concept which is utterly foreign to the antitrust policy of price competition. The prices of a businessman who undersells his competitors are almost always "unreasonably low" in their eyes. The Government has said elsewhere that it does not mean to construe this law as one designed to curtail price competition and secure a reasonable profit for everyone (G.B.R. 19). But its basic position on interpretation of the statute belies its disclaimer. Its position is that failure to charge a price which will yield a profit (*i.e.*, a sale below cost) is prima facie illegal, and that a jury should judge the reasonableness of the defendant's conduct in terms of what the average businessman would think about the defendant's prices. No approach could be more calculated to induce confusion as to the meaning of this clause in the minds of vigorous competitive-minded businessmen.

Third, the Government expressly regards its sales below cost theory, discussed next, as a more definite formulation than this overall "rational businessman" test. In fact, statements made toward the end of the Government brief eliminate the possibility of bringing sales *above* cost within the statute. The Government gives the flat assurance that all a businessman has to do to be sure of compliance is to "sell above cost, a normal business objective" (G.B.R. 40). It adds: "[I]f the sales are yielding a profit, according to the seller's *bona fide* method of accounting, no inference of unreasonable pricing could be drawn merely from proof that, according to another method of accounting, he

is selling at a loss." (G.B.R. 41). These remarks yield no other interpretation than that the Government concedes that sales above cost are, as a matter of law, not at "unreasonably low prices." The very broad formula constructed by it at the outset of the brief therefore seems to have no real role to perform at all. Accordingly, we turn for a more extensive treatment to the theory of "sales below cost" upon which the Government places its real reliance.

2. A Prima Facie Presumption That Sales Below Cost Are Unreasonable Is Unsupportable.

If Congress had intended to make sales below cost prima facie illegal as contended by the Government, the question arises at once as to why it did not use such language. Especially is this so in light of the fact that the Government has found it possible to state this idea repeatedly. Congress should not be assumed to have intended a thing so radically different from the language it actually used, when it could easily have used more appropriate words had it so desired.

It is clear that Congress did not use such language as the Government uses because the ideas involved would be offensive to logic, to basic traditions of American criminal legislation, and to generally accepted facts concerning the nature of selling below cost. The concept advanced by the Government would create a presumption of criminal guilt as to conduct, *i.e.*, selling below cost, which on the Government's own admission, may be innocent rather than wrongful (G.B.R. 41-42). Such a presumption, especially one rising to the level of a prima facie case, thus rests on a false premise and the Government's legal conclusions are unsound.

Moreover, this presumption would place upon defend-

ants, through the device of shifting the burden of proof, the responsibility for defining the crime initially, a responsibility which rests upon the legislature itself. It would transfer to the jury, under the guise of its passing on the issue of justification, the ultimate decision as to what the law governing these sales should be. The presumption would be offensive to the fundamental principle of the presumed innocence of persons charged with crime, by which the whole system of American criminal law has been made compatible with a free society. It is not necessary to consider here whether Congress could constitutionally enact such a statute—it is enough to point out the substantial reasons for concluding that it is extremely unlikely that it intended to do so in this instance.

It is important to note how far the Government goes in contending that sales below cost are prima facie unreasonable. The brief advances over and over the proposition that sales below cost are by nature indicative of unreasonable behavior and of unlawful intent. It states that such sales can be justified only in "extraordinary circumstances" (G.B.R. 42) and that (G.B.R. 38):

> "Selling below cost, in the absence of special circumstances, is explicable only as part of a campaign to destroy competition; and it inevitably will have that effect . . . ."

While admitting "special situations" where such sales would be legitimate (G.B.R. 41-42), it states that "selling at a loss . . . constitutes selling at unreasonably low prices" in the absence of "abnormal business circumstances" (G.B.R. 40).

This attempt to construe the statute to make "sale below

cost" amount almost to "sale at an unreasonably low price" is based upon a totally unrealistic view of pricing in the modern economy. Selling below cost is by itself a neutral occurrence and is an every day happening in most businesses for a variety of normal reasons. This is obvious from the Government's own list of so-called "special situations": (1) disposing of excess inventory; (2) selling obsolete or spoiling merchandise; (3) closing out a line which the seller wishes to discontinue; (4) introducing a new product or breaking into a new market; (5) meeting competition in good faith; (6) reducing prices to increase profits by increasing volume; and (7) pricing by-products or minor lines at less than "fully distributed" cost (G.B.R. 41-42).

Plainly these examples are not "special situations," but are normal and frequent business events. Business concerns of all types are constantly faced with the problem of disposing of excess or obsolete goods. Further, sellers introducing new products in our fast-changing economy are often required to absorb losses for substantial periods of time while the products become established in the market. And it is difficult to conceive of any sale below cost which would not come within the Government's sixth example, *i.e.*, made with the hope of increasing volume and thereby improving the seller's profit situation.

Even so, the Government's list is far from complete. It should certainly also include at least the following: (8) sales which prove to be below cost because the seller has overestimated the volume he would sell at the announced price; (9) sales which are below cost because costs unexpectedly increase during the selling period; (10) sales which are below cost because the seller is less efficient than competitors,

and is losing out in the competitive struggle; (11) sales which are below cost because of inefficiency, but which are made in order to stay in the market while more efficient methods are introduced; (12) sales of items which are carried for the convenience of customers whose main patronage is as to other products; (13) sales made to stimulate business, such as two-for-one promotions and "one-cent" sales, and sales of one product at a low price for the purpose of advertising the seller's whole business; and (14) the very frequent situation of sales which are below cost simply because the seller does not know what his individual unit costs are.

It is thus obvious that there are countless situations in which selling below cost cannot be regarded as improper conduct.[15] In 1961, 17,075 industrial and commercial business concerns failed (U.S. Dep't of Commerce, *Statistical Abstract of the United States* 506 (1962)). In the same year, over 5,000 bankruptcy cases were filed in the District Courts involving bankrupt merchants and manufacturers (*id.* at 507). Many, if not most, of these failing enterprises undoubtedly were forced to make substantial sales at unprofitable prices. The Government argument overlooks the fact that by far the most frequent result of selling below

15. We know of no case holding that selling below cost is equivalent to selling at unreasonably low prices. Ben Hur Coal Co. v. Wells, 242 F.2d 481 (10th Cir. 1957), cited by the Government (G.B.R. 38), did not equate selling below cost and unreasonably low prices, nor did it define either term. It said only that "consistently" selling at a loss "without competitive compulsion" (*id.* at 486) could not be defended as not selling at unreasonably low prices. The court concluded that no violation was shown because of lack of illegal purpose.

cost for a substantial period is not destruction of competition, as it claims, but failure of the unfortunate concern which for any reason must make such sales.

It is submitted that the presumption concerning sales below cost should be the opposite of that argued by the Government. It is far more accurate to say that sales which are actually at less than cost are usually for innocent reasons and are only contrary to antitrust policy in "extraordinary" situations.

The Government indulges in a mere play on words when it says that since businesses are designed to make a profit, selling below cost is "unreasonably low" in a business sense (G.B.R. 42). Perhaps top company officials would look askance at a regional manager who did not understand that selling at a loss is usually undesirable. But this teaches nothing about Congressional intent on this subject (G.B.R. 24). Surely the Government does not mean that Congress has made it a crime to fail to make a profit, to be inefficient, to be ignorant, to become a business failure, or to alarm top company officials. Yet this is the logic of the particular Government argument.

Obviously, what an "unreasonable" price is must be determined from the law. The only real test offered by the Government to determine when a low price, including a sale below cost, is "unreasonable" is to determine whether the price is coupled with "predatory intent." The brief frankly states that, "indeed, the seller's predatory intent is the very core of the illegality" (G.B.R. 39) and "the heart of the violation" (G.B.R. 43). Summarizing its position on this issue, the Government says flatly: ". . . if they sell below cost for the purpose of destroying competition, they are committing a criminal offense" (G.B.R. 42). In other

words, selling below cost is unreasonable only if accompanied by predatory intent.

The Government position plainly rests upon the fallacy of using the intent phrase of the statute to satisfy the requirement of showing the price to be "unreasonably low," contrary to its own analysis that these are separate elements to be separately proved (G.B.R. 20). Proof of predatory intent under this approach would thus be used twice. First, it would be used to demonstrate that a low price was unreasonable. It would then be used again to satisfy the intent requirement of the clause. This would read the "unreasonably low prices" test out of the statute. As the Government points out, Congress did not place sole reliance upon intent as a device for separating desirable competitive price cuts from undesirable reductions because it is so difficult to discern the difference. The Government would not only have the Court do what it says Congress meant to avoid, but it says further that proof of illegal intent could be almost automatic; it has stated that if a firm selling at low prices knows that the result will be to injure its competitors, "it could hardly deny an allegation of [illegal] purpose" (G.B.R. 18).

The startling and, we submit, wholly unacceptable implication of the Government theory may best be seen by summarizing it. Under this theory, proof of sales below cost will create a prima facie case of unreasonableness: the Government states that "selling at a loss . . . constitutes selling at 'unreasonably low prices' unless there are abnormal circumstances which justify the losing operations" (G.B.R. 40). Proof of selling below cost also will create a prima facie case of illegal purpose: the Gov-

ernment says that "selling below cost, in the absence of special circumstances, is explicable only as part of a campaign to destroy competition . . ." (G.B.R. 38). "Selling below cost" alone therefore is offered as a sufficient basis for conviction. Apart from defending on the issue of whether the sales actually were below cost, the only defense would be some kind of justification. No one can know what justification will be held sufficient until it has been tried and a judge and jury have ruled. The statute is silent, and the Government does not commit itself. The most critical questions concerning the statute's meaning are thus left unanswered.

The parties are in agreement that the phrase, "unreasonably low prices," must be given a meaning which is independent of the illegal intent phrase. The Government has clearly failed to accomplish this in its effort to make selling below cost ipso facto "unreasonable."

3. Even if "Selling Below Cost" Were Treated as an Equivalent of "Unreasonably Low Prices," the Statute Would Be Unconstitutionally Vague Because of Lack of Any Definite Rules for Interpreting and Applying It on a "Cost" Basis.

Assuming with the Government that all one need do to comply with the law is to "sell above cost" (G.B.R. 40), this statute still would not provide the seller with the guidance as to the cost standards involved necessary to satisfy the constitutional requirements of definiteness. As an abstract concept, "cost" may be readily understood. But unless it is carefully defined, "cost" is not a sufficiently definite standard to serve as a dividing line between legal and criminal conduct.

In order to comply with and safely follow a cost standard in determining his prices, a seller must know: (1) whose cost is relevant, *i.e.*, his own cost, the cost of one or more competitors, or average costs; (2) what kinds of costs must be taken into account and over what period of time they are to be determined; (3) how to segregate joint costs among individual products manufactured by the seller and how to allocate indirect costs; and (4) how to determine these things in advance of announcing his price. The Government calls Section 3 a "living directive addressed to the business community" that if firms sell below cost to destroy competition they commit a crime (G.B.R. 42). If so, this "directive" should provide answers to these questions. Obviously, however, it supplies none whatever. The basic position of the Government seems to be that most of these questions do not need to be answered. It says that to ask whether "selling below cost" is a vague and indefinite standard "misses the point entirely" (G.B.R. 40), and the Government belittles the whole question of what is meant by "cost" and how it is to be determined. Evidently it would resolve these ambiguities by enveloping them in an amorphous question of "reasonableness" to be delegated to a jury (G.B.R. 41).

This approach flouts the definiteness requirement of the Constitution and asks the Court to adopt a view of cost which completely ignores all experience and responsible teaching on the subject.

a. *Whose Cost Is Relevant?*

The Government assumes, as if it were too obvious to require discussion, that it is the seller's own costs which govern (G.B.R. 40). There is no basis whatever for this

proposition either in the statute or in anything to which the defendants in this case could have looked for guidance prior to the Government's argument on appeal.

While it might seem at first glance that the seller's own cost should be determinative, this assumption becomes doubtful when it is examined. Usually the costs of different firms in an industry are different. Suppose that a seller's costs appear to be higher than those of competitors. May he safely go below his own cost in the course of competition? It would seem that he should be allowed to do so. But the statute is silent. The Government volunteers that "meeting in good faith the equally low price of a competitor" *might* justify selling below cost "to retain a customer" (G.B.R. 42), but may a seller rely upon that in the face of the Government's basic argument that selling below one's own cost is prima facie illegal? Moreover, what kind of "meeting competition" below cost will be permitted does not appear, except that the Government's choice of words imports a narrow scope for the defense. The vexatious controversies over the meaning of the defense in civil cases under Section 2 of the Clayton Act are well known to the Court. *Standard Oil Co. v. FTC*, 340 U.S. 231 (1951); *FTC v. Standard Oil Co.*, 355 U.S. 396 (1958).

Conversely, suppose that the defendant's costs are lower than those of his competitors, and that he persistently sells at prices which are consistently below their costs but which are profitable to him. Will he be safe in assuming that the Government will not prosecute him if competitors are injured, either by contending that his own costs are not in this instance a decisive standard or by attacking the bona fides

of his accounting system under a law which is standardless on that subject?

b. *What Costs Are Relevant?*

Even if it were clear whose cost will govern, it would still be unclear what types of costs are to be included and over what period of time they are to be calculated. Here again the statute supplies no guidance. Will "direct" costs suffice, or must all costs be "fully distributed" to each unit sold? The most easily ascertained cost, especially for retailers, would be the direct cost of goods sold. Retailers, with stores handling hundreds or thousands of different items, might reasonably believe that "sale below cost" would mean sale below the invoice cost of the merchandise. Such retailers obviously seldom know, or can take time to consider, their other costs when pricing a single item in a store-full of items. Also, processors such as dairy concerns might believe that they were not selling below cost for purposes of such a statute as this if they sold one of their products above the cost of the major raw material used. These uncertainties as to what would constitute below-cost sales are greatly increased by the fact that, in deciding whether to make a given sale, a businessman naturally will reflect the familiar maxim of economics that operations are not unprofitable if they produce revenue which covers marginal cost.

But in any contested case, prosecutors may contend that "cost" must include total actual costs, and not only all direct costs but also a proper allocation of the indirect costs of doing business. The Government here evidently would argue that all "direct and indirect" costs must be included (G.B.R. 30). Although this subject is enormously complicated by

many variable factors which can greatly alter the result, the statute provides no guidance.

The extreme difficulty of identifying and defining relevant costs was emphasized by a Department of Justice letter to the House Interstate and Foreign Commerce Committee in 1960, opposing H.R. 10235 in the 86th Congress, Second Session. That bill, introduced by Congressman Patman after the *Nashville Milk* case in an effort to meet the Court's objections to the vagueness of the "unreasonably low prices" clause, undertook to provide some definitions. It defined "unreasonably low prices" as including a sale "at a price below cost, as such term is defined by the law" of an applicable state sales-below-cost statute (*Hearings on H.R. 10235 Before a Subcommittee of the House Committee on Interstate and Foreign Commerce*, 86th Cong., 2d Sess. 6 (1960)). In the absence of a state law, the bill provided the following definitions for sales below cost (*id.* at 2):

> "(1) in the case of a producer, a sale at a price less than the cost of manufacturing, packaging, and selling a commodity together with the payment of such transportation costs as are actually borne by a producer; and (2) in the case of any other vendor, a sale at a price less than the invoice or replacement costs of the commodity plus the overhead cost and other costs of the vendor doing business."

Although these definitions made the bill far more certain than the present statute would be as construed by the Government, the Department of Justice letter nevertheless objected to them as "vague and uncertain." It criticized the references to state law in part on the ground that it would be difficult to determine which law would apply, the point

to the criticism being that the state law definitions of "cost" vary greatly. It criticized the definitions quoted above, as follows (*id.* at 7):

> "The definitions to be applicable in the absence of State law would also present problems, particularly with respect to the meaning of the word 'cost.' The cost of manufacturing, of packaging, of selling, not to mention overhead cost, *are all imprecise terms* as to the meaning of which there will no doubt be disagreement." (Emphasis added.)

The Department stated further that these bills would "carry over many of the ambiguities inherent in the present language of Section 3 of the Robinson-Patman Act and would add to them other difficulties and uncertainties . . ." (*ibid.*).

The Federal Trade Commission also opposed the bill for similar reasons. It found that the above-quoted definition was "too general and leaves unanswered many questions" (*id.* at 4). The Commission regards determination of cost as an extremely complicated matter and believes that even a civil provision prohibiting sales below cost which the Commission itself would administer should have a highly detailed definition of cost. It proposed to the House Committee, *supra*, a specific definition of cost, which is set forth in the footnote.[16] Comparison of this definition with the com-

16. ". . . the term 'cost' means the respective seller's cost and not an average cost in the industry whether such average cost be determined by an industry cost survey or some other method. It consists of the total outlay or expenditure by the seller in the acquisition, production, and distribution of the products involved, and comprises all elements of cost such as labor, material, depreciation, taxes (except taxes on net income and such other taxes as are not properly applicable to cost), and general overhead expenses, in-

pletely undefined concept of "cost" offered by the Government in this case highlights the glaring deficiencies in the proposed approach.

The experience of the states with detailed prohibitions of sales below cost also illuminates the problem of definiteness about the meaning of "cost." There are about 30 states having laws of general applicability imposing certain prohibitions upon sales below cost under defined and qualified circumstances, and others which have laws relating to specific commodities.[17] Practically all of these laws set forth definitions of "cost," detail the elements which must be included in the determination of cost, and provide some basis for determining cost. The Government's assertion that in this respect no definiteness is needed should be contrasted with a typical state provision such as the one set forth in the footnote.[18]

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curred by the seller in the acquisition, manufacture, processing, preparation for marketing, sale, and delivery of the products. Not to be included are dividends or interest on borrowed or invested capital, or nonoperating losses, such as fire losses and losses from the sale or exchange of capital assets. Operating cost should not be reduced by items of nonoperating income, such as income from investments, and gain on the sale of capital assets." *Hearings on H.R. 10235 Before a Subcommittee of the House Committee on Interstate and Foreign Commerce*, 86th Cong., 2d Sess. 4-5 (1960).

17. The state statutes are listed at 2 TRADE REG. REP. ¶ 6571, *et seq.*, and the full text of each statute is set forth in 4 TRADE REG. REP. beginning at p. 35,001.

18. The following definitions of "cost" found in the Arkansas statute are typical of the provisions of a number of the state laws:

> The term "cost" as applied to production is hereby defined as including the cost of raw materials, labor and all overhead expenses of the producer; and as applied to distribution "cost"

Illustrative of the impossibility of understanding and applying a cost test of the type urged by the Government without a definition is the fact that the Arkansas definition quoted in the note expressly includes interest on borrowed capital and all types of taxes, while the Federal Trade Commission definition (*supra*, pp. 44-45 n.16) excludes interest and some, but not all, taxes. Virtually all of the state legislatures have recognized a need to clarify the "cost" concept. Nevertheless, the variation in the detailed provisions of the different state laws is itself eloquent evidence of the difficulty of deciding what "cost" is. Consequently, a majority of the statutes do not stop with definitions but go even further to reduce uncertainty by specifying an arbitrary percentage markup to be added to the cost of goods of wholesalers and retailers. This markup is a legislative determination of the defendant's "cost of doing business" to be used unless the defendant shows that his actual costs were lower. It is interesting to note that there is even great variation from state to state in these statutory percentages. Different statutes provide for 2%, 4%, 5%, 6%, 7%, 8% and even 12% (2 *Trade Reg. Rep.* ¶ 6709), showing basic disagreement as to what a reasonable allowance or average for costs of doing business should be.

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shall mean the invoice or replacement cost, whichever is lower, of the article or product to the distributor and vendor plus the cost of doing business by said distributor and vendor.

The "cost of doing business" or "overhead expense" is defined as all costs of doing business incurred in the conduct of such business and must include without limitation the following items of expense: labor (including salaries of executives and officers), rent, interest on borrowed capital, depreciation, selling cost, maintenance of equipment, delivery cost, credit losses, all types of licenses, taxes, insurance and advertising. (ARK. STAT. tit. 70, ch. 3, § 70-303 (1947).)

Even with their detailed definitions, some of the state statutes have encountered constitutional difficulty on grounds of vagueness and uncertainty *id.* at ¶ 6629. No state statute which fails to define cost has been upheld against an attack for vagueness so far as we have been able to determine. The Supreme Court of Kansas recently invalidated, under the federal and state constitutions, provisions of a statute governing sales of milk which made it unlawful to sell milk "for less than cost to the wholesaler, processor or distributor at the point of delivery." *State v. Fleming Co.*, 184 Kan. 674, 339 P.2d 12 (1959). The remarks of the court are especially apt in view of the Government's assertion here that all the seller need do is to refer to his own books and rely on his own methods of accounting, if bona fide, to know whether he is above or below the undefined "cost" supposedly contemplated by the statute. The court declared the provision unconstitutionally vague partly because it contained no definition of cost, stating (184 Kan. at 681, 339 P.2d at 17):

> "It is argued that in this day and age, everyone in business has the services of accountants but it will be seen that the statute leaves unanswered the question of whether the cost is to be determined as of a particular shipment or based upon business for a week, a month, six months or a year. The statute is totally silent as to what expenses are to be included in arriving at the cost at the point of delivery."

There the state argued, as the Government does here, that the defendant would know his own costs and could therefore comply with the statute. The court did not accept this oversimplification (*ibid.*):

> "The appellant would read the statute to simply pro-

vide that the appellees should keep books in good faith. But we cannot feel that the interpretation of the statute is so simple."

c. *How Are the Relevant Costs To Be Determined and Allocated?*

There are still further serious difficulties with using "sale below cost" as a test of "unreasonably low prices." Even if there were complete agreement upon whose costs will govern and what costs should be included, there would remain the complex problems of computing the relevant costs and of allocating indirect and joint costs to particular sales of particular products. The complex and arbitrary choices necessarily inherent in such determinations, revealed by cost justification proceedings in civil cases under the cost proviso of Section 2(a) of the act (see Appendix to this brief) are notorious. These difficulties prompted the Court to advert to "the intricacies inherent in the attempt to show costs" in such proceedings and to the "elusiveness of cost data, which apparently cannot be obtained from ordinary business records . . ." *Automatic Canteen Co. v. FTC*, 346 U.S. 61, 68 (1953).

The cost justification proviso is far more definite than the undefined standard offered here. It names the costs which are relevant to a determination under Section 2(a) and, moreover, operates only after the respondent has committed a prima facie violation and is thus on notice of possible illegality. The proviso operates only in civil, and not in criminal, situations. Even so, it has proved to be extremely difficult to apply. In 1956, the Federal Trade Commission's Advisory Committee on Cost Justification confirmed these difficulties. The Committee directly contradicts the Gov-

ernment's contention here that it is a simple matter for defendants to produce the relevant cost information from their own records.[19] As the Committee stated: "It has not been customary for business enterprises to calculate and record the costs of commodities and distribution services in the detail required for a Robinson-Patman Act determination."[20] The Committee completely rejected any assumption that product costs can be readily determined in accordance with "scientific" cost accounting procedures:

> "Cost accounting is not and can never become an exact science because of the inherent element of judgment. Despite the prescription of uniform and detailed cost accounting procedures, two equally competent cost accountants may obtain different results from the same data. For this reason all cost accounting and cost analysis results should be accepted as reasonable approaches to accuracy, and not as precise measurements. The fact

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19. Few agencies have had more experience with the relation of costs to prices than the Office of Price Administration in World War II. In 1946, Congress was considering a proposal that prices fixed by OPA should provide for total costs plus a reasonable margin of profit. The Deputy Administrator for Accounting of OPA, Paul M. Green, reported to the Banking and Currency Committee of the House of Representatives that probably 85% of all industrial companies do not allocate cost information on a product basis and hence could not produce cost information needed to determine prices on a cost basis. Later, this estimate was more than confirmed by a survey of 187,370 companies. EDWARDS, PRICE DISCRIMINATION 592-93, n.18 (The Brookings Institution, 1959).

20. ADVISORY COMMITTEE ON COST JUSTIFICATION, REPORT TO THE FEDERAL TRADE COMMISSION 10 (1956); CCH, COST JUSTIFICATION REPORT, TEXT OF REPORT TO THE FEDERAL TRADE COMMISSION BY THE ADVISORY COMMITTEE ON COST JUSTIFICATION 14 (1956).

that unit costs are frequently stated in mathematical terms, after elaborate and painstaking calculations, gives them an aura of precision that is not warranted. With few exceptions, every unit cost and every cost difference is subject to some plus or minus allowance. This fact is universally recognized for managerial purposes and should be for purposes of the Robinson-Patman Act. Most of the difficulties of proof stem from the fact that cost differences at best include elements of opinion and approximation." (*Advisory Committee Report* at 6, *CCH* at 10, *op. cit. supra*, n. 20.)

These authoritative characterizations of the difficulties of determining the unit costs of particular products are confirmed by Prof. Corwin Edwards, former chief economist of the Federal Trade Commission. In his book on price discrimination,[21] he points out that individual sellers frequently market a number of commodities, and that when the cost of one of these products comes into question, it becomes necessary to segregate the costs applicable to that product from the costs applicable to the others. This is an extremely difficult thing to do. The problem would arise under the present indictment, which covers a number of different products expressly lumped together under the term "milk," including not only milk and cream in their various forms but also "by-products such as cottage cheese and sour cream" (R. 2).[22]

Moreover, as Prof. Edwards points out, the further

21. EDWARDS, PRICE DISCRIMINATION 591 (The Brookings Institution, 1959).

22. As Walton H. Hamilton said shortly after enactment of the Robinson-Patman Act: "No accountant has been able to devise a method yielding by-product or joint-cost figures which does not embody a dominance of arbitrariness and guesswork". Hamilton,

difficult problem arises of allocating responsibility for various costs of doing business to particular products. There are, he states, "often several plausible ways in which that responsibility can be determined, each differing from the other in the resulting computation of costs."[23] He discusses the inherent limitations on the ability of sellers to price their products in terms of cost because of uncertainties as to the volume which will be sold, the efficiencies which will be achieved by different production levels, and the other inherent obstacles to knowing one's costs in advance.

These demonstrations of the inherent difficulty of using cost as a standard for price in the relatively narrow and defined area of cost justification under Section 2(a) are all the more pertinent to the totally undefined standard of cost offered by the Government as an absolute test of the legality of prices. The difficulties are borne out by careful analysis of experience under the state sales-below-cost statutes.[24]

Cost as a Standard for Price, 4 LAW AND CONTEMP. PROB. 321, 328 (1937). Another well-recognized authority in the accounting field suggests four ordinary methods of accounting for by-products, of which yields a different result and three of which involve attributing no cost at all to the by-products. WIXON, ACCOUNTANT'S HANDBOOK 6-72 (Ronald, 4th ed. 1961). Acceptable methods of attributing costs to joint products include allocation of costs on the basis of (1) relative market *price*, (2) proportionate volume of common material, (3) a survey "whereby common costs are allocated to joint products *arbitrarily* after consideration of a number of important factors. . . ." (*Id.* at 6-70, -71, emphasis added.)

23. EDWARDS, *op. cit. supra* note 21, at 596-97.

24. Clark, *Statutory Restrictions on Selling Below Cost*, 11 VAND. L. REV. 105, 123 (1957); Lovell, *Sales Below Cost Prohibitions: Private Price Fixing Under State Law*, 57 YALE L.J. 391, 396 (1948).

The Government is thus grossly in error when it asserts that determining whether defendants have sold below cost will be a simple matter. The same error undermines the opinion in *F. & A. Ice Cream Co. v. Arden Farms Co.*, 98 F. Supp. 180, 189 (S.D. Cal. 1951) (quoted at G.B.R. 40), in which the district judge, whose authorization in the same case of private suits under Section 3[25] has since been invalidated by this Court's holding in the *Nashville Milk* case, voiced the erroneous impression that "cost accountancy has reached the exactness of a science" (98 F. Supp. at 189).

d. *Actual Costs Are Often Unascertainable in Advance of Sale, and Books Kept in the Ordinary Course of Business Do Not Provide the Cost Information Needed.*

Perhaps the most serious objection to the Government's undefined "sales below cost" proposal is the fact that sellers very frequently have no way of determining the unit costs of individual articles to be sold until sometime after the sale has occurred. A criminal prohibition making sales below cost presumptively illegal without providing the definitions and standards necessary to solve this problem lacks constitutional definiteness.

The Government states that the "overwhelming proportion" of the cases it will bring will be ones in which the seller's own books will be available as evidence (G.B.R. 41). It proposes to use the books as follows: "A seller who drops his prices, without a nonpredatory reason, to a level which is below cost according to his own records," it is said, will

25. Balia ..ce Cream Co. v. Arden Farms Co., 94 F. Supp. 796 (S.D. Cal. 1950).

be violating the law. If his accounting is "*bona fide*" and shows a profit, he is not violating the law. If he "reasonably thinks" he is not selling at a loss, "that is the end of the matter." (G.B.R. 41.)

This blithe reliance by the Government upon the seller's own books creates an illusion of definiteness that does not exist. It will solve no problems concerning definiteness insofar as sellers who must comply with the law are concerned. Nor will it solve them for the courts. First, sellers usually are not able to keep, in the ordinary course of business, cost records showing the actual unit costs of individual articles in the particularity necessary to compare them with unit prices for purposes of a rule such as is proposed. In the day to day conduct of business, sellers can not afford to attempt the intricate accounting which would be required. As the Court has pointed out, accurate data of this kind is extremely hard to obtain, and "apparently cannot be obtained from ordinary business records" but "only after detailed investigation of the business." *Automatic Canteen Co. v. FTC*, 346 U.S. 61, 68-69 (1953).

Moreover, even if such a "detailed investigation" could be obtained for each price, it would seldom be possible to do so before the sales are made because the actual costs per unit will depend upon the volume actually sold and the expenses actually incurred in producing and selling the units concerned. The Government's brief in fact admits that "unit costs" will vary with the volume sold (G.B.R. 30-31). Consequently, the *advance guidance* needed for compliance is lacking. It will be noted that the Government does not say that it will limit the cases it brings to ones in which the

seller's records showed the relevant costs prior to the sales under attack.

Further, the Government obviously will feel free to challenge the correctness of the seller's books if it distrusts them. It says that the question is what the seller "*reasonably thinks*" (G.B.R. 41, emphasis added), and this means whether his accounting is "*bona fide*" (*ibid.*). Likewise, the seller must be permitted to show, if he wishes, that his books are not reliable evidence on the particular issue. The Government's representation that "refined problems of cost accounting" can and will be ignored (G.B.R. 40) in favor of its grossly unrefined approach to the subject of costs is therefore erroneous.

Finally, a sales "below cost" standard for prices, without detailed regulations for its observance, is completely impracticable in the presence of competition. Persons who are buffeted by market price competition cannot confidently determine their prices in terms of cost. Only a seller enjoying the protection of monopoly, such as a public utility, is relatively free to determine price on the basis of cost. As has recently been pointed out: "[S]ellers exposed to market forces must quote prices responsive to the pressures of demand and competition . . . indeed, prices . . . may *determine* the unit cost of the output more than vice versa". Rowe, *Price Discrimination Under the Robinson-Patman Act*, 306 (1962). The Government's contrary suppositions are unsoundly premised and provide no basis for a constitutionally definite control of low prices under threat of criminal punishment.

II. THE DECISIONS OF THIS COURT DEMONSTRATE THAT A PROHIBITION OF "UNREASONABLY LOW PRICES" IS NOT SUFFICIENTLY DEFINITE TO SATISFY CONSTITUTIONAL REQUIREMENTS.

A. The Constitutional Invalidity of a Reasonableness Test for Price Is Established by a Long and Consistent Line of Constitutional and Antitrust Decisions of This Court.

Under the decisions of this Court the constitutional requirement is that "the terms of a penal statute . . . must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties . . ." *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). In its revised brief (G.B.R. 48) the Government expressly agrees "that it is the adequacy of the statute which must be tested" and, as we have pointed out, now devotes considerable effort to an attempt to cloak the vague stricture on setting "unreasonably low prices" with sufficient meaning to meet this constitutional test.

The clause at issue makes reasonableness the basic criterion by which legal prices are to be distinguished from illegal ones. The Court, however, has often tested the constitutional adequacy of that criterion as a standard for demarcation of illegal prices in our competitive economy and has, as often, found it wanting. Whatever the constitutional status of tests of reasonableness in other contexts, beginning with the leading decision in *United States v. L. Cohen Grocery Co.*, 255 U.S. 81 (1921), the Court has held unconstitutional all attempts to outlaw *prices* as "unreasonable."

The *Cohen Grocery* case involved the validity of a federal statute, known as the Lever Act, which undertook to control prices in World War I by penalizing any person who

"wilfully" made "any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries" (255 U.S. at 86). The Court had to decide whether these words prohibiting unreasonable prices "constituted a fixing by Congress of an ascertainable standard of guilt and are adequate to inform persons accused of violation thereof of the nature of the accusation against them. . . ." From their "mere statement" the Court thought it obvious "that they are not." Nevertheless, the Court articulated the reasons for holding the Lever Act unconstitutional, and its rationale is equally applicable to the "unreasonably low prices" clause here at issue (225 U.S. at 89):

> "Observe that the section forbids no specific or definite act. It confines the subject-matter of the investigation which it authorizes to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against."

Thus, as the Government points out, a vice of the Lever Act was its failure to relate the standard of reasonableness that it invoked "to any point of view, and to a standard or practice discernible from either the historical background of the legislation or the common understanding of persons to whom it applied" (G.B.R. 28-29). But for constitutional purposes the words of the Lever Act and of the "unreasonably low prices" clause are identical. If anything, the Lever Act was the more explicit of the two because the statute itself made its general purpose plain: it was a wartime emergency measure which was expressly designed to eliminate "excessive" prices, prices that would

allow sellers to reap exceptional profits as a result of shortages or other extraordinary circumstances caused by the war (25 U.S. at 81-82 n.1). On the other hand, the purpose of the "unreasonably low prices" clause cannot, as we have seen, be deduced from its context or its history. Moreover, as we shall show, the decisions of this Court hold that its language invokes no known business standard and that the *Cohen Grocery* precedent is applicable whenever "unreasonableness" is made the sole indicator of the illegality of competitive *prices*.

The Court followed *Cohen Grocery* in a series of contemporaneous cases also involving the Lever Act.[26] And in *A. B. Small Co. v. American Sugar Ref. Co.*, 267 U.S. 233 (1925), it held the Lever Act's blanket proscription of unreasonable prices unconstitutionally indefinite even for civil purposes, pointing out that the cryptic statutory language provided no workable standard by which to determine guilt: "The federal statute contained no provision pointing to what should be deemed a . . . reasonable . . . price; and there was no accepted and fairly stable commercial standard which could be regarded as impliedly taken up and adopted by the statute . . ." (*id.* at 240-41).

The same question was raised again in *Cline v. Frink*

26. Tedrow v. A. T. Lewis & Son Dry Goods Co., 255 U.S. 98 (1921); Kennington v. Palmer, 255 U.S. 100 (1921); Kinnane v. Detroit Creamery Co., 255 U.S. 102 (1921); C. A. Weed and Co. v. Lockwood, 255 U.S. 104 (1921); G. S. Willard Co. v. Palmer, 255 U.S. 106 (1921); Oglesby Grocery Co. v. United States, 255 U.S. 108 (1921). In Weeds v. United States, 255 U.S. 109, 111-12 (1921), the same rationale voided a different section of the Lever Act purporting to prohibit "conspiracies to exact excessive prices."

Dairy Co., 274 U.S. 445 (1927), this time in an antitrust context, testing a state statute outlawing certain conspiracies in restraint of trade *unless* "their purpose shall be to obtain only a reasonable profit . . ." (274 U.S. at 456). In an opinion by Mr. Chief Justice Taft, the Court unanimously held the statute "so vague and uncertain [that it] . . . violates due process and cannot be distinguished from the case of *United States v. Cohen Grocery Company* . . ." (274 U.S. at 453-54). Such an exception, the Court said, "leaves the whole statute without a fixed standard of guilt . . ." (274 U.S. at 457).

Although *Cohen Grocery* and *Cline* are the leading constitutional decisions in point, the opinion they manifest as to reasonableness as a test of the legality of prices in unregulated segments of our economy is not unique. The Court has repeatedly held that the reasonableness of prices in competitive situations cannot be satisfactorily determined by the courts because of the inherent uncertainty of any concept of "reasonable price" and because the amount of the prices does not determine whether competition has been unreasonably diminished.

Since adoption of the rule of reason as the standard of construction of the Sherman Act in *Standard Oil Co. v. United States*, 221 U.S. 1 (1911), the Court has consistently refused to judge the reasonableness of prices in antitrust cases. Explaining this position in *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927), a price-fixing case, the Court relied expressly on the constitutional decisions, stating per Mr. Justice Stone (273 U.S. at 398):

> "Moreover, in the absence of express legislation requiring it, we should hesitate to adopt a construction making

> the difference between legal and illegal conduct in the field of business relations depend upon so uncertain a test as whether prices are reasonable—a determination which can be satisfactorily made only after a complete survey of our economic organization and a choice between rival philosophies. Compare *United States v. Cohen Grocery Co.*, 255 U.S. 81; *International Harvester Co. v. Kentucky*, 234 U.S. 216; *Nash v. United States, supra.*"

The Court reiterated these objections to a reasonableness test for prices in the leading case of *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). That decision held price-fixing to be unreasonable "per se" because of its inherent inconsistency with free competition. But the Court sharply distinguished its conclusion that the restraint of trade involved was per se unreasonable from the wholly different question of the reasonableness of the prices that had been fixed. With the latter it would have nothing to do. In the language of Mr. Justice Douglas (310 U.S. at 221, emphasis added):

> "If the so-called competitive abuses were to be appraised here, the reasonableness of prices would necessarily become an issue in every price-fixing case. In that event the Sherman Act would soon be emasculated; its philosophy would be supplanted by one which is wholly alien to a system of free competition; it would not be the charter of freedom which its framers intended.
>
> "*The reasonableness of prices has no constancy due to the dynamic quality of business facts underlying price structures.* Those who fixed reasonable prices today would perpetuate unreasonable prices tomorrow, since those prices would not be subject to continuous admin-

istrative supervision and readjustment in light of changed conditions."

It is not surprising therefore that the Court recently noted the relevance of the leading decisions in *Cohen Grocery* and *Cline* to the prohibition in issue here, the "unreasonably low prices" clause of the Robinson-Patman Act. In *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373, 378 (1958), Mr. Justice Harlan, speaking for the majority, referred to the clause as a "vague provision" and in his opinion observed that, "the District Court indicated that the vagueness of the 'unreasonably low prices' provision might give rise to constitutional difficulties, if such questions had to be faced. Cf. *United States* v. *L. Cohen Grocery Co.*, 225 U.S. 81, *Cline* v. *Frink Dairy Co.*, 274 U.S. 445. See Comment, 55 Mich. L. Rev. 845, 853-56. . . ."[27]

Indeed, the Court has consistently rejected reasonableness and comparably general indicators of legality as too vague to serve as standards of criminal guilt in complex economic situations. In *International Harvester Co. of America v. Kentucky*, 234 U.S. 216, 221 (1914), the Court invalidated a provision for prices based on "market value under fair competition, and under normal market conditions."[28] The

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27. While the dissenting opinion in the *Nashville Milk* case, by Mr. Justice Douglas, urged that Section 3 is a proper foundation for private suits, the opinion was addressed to the section as a whole and mentioned particularly only its price discrimination prohibitions. The constitutional status of those provisions, however, may be different from the status of the "unreasonably low prices" clause which is not qualified by the more definite requirement of discrimination.

28. The same result was reached in the companion cases of American Seeding Mach. Co. v. Kentucky, 236 U.S. 660 (1915), Collins v. Kentucky, 234 U.S. 634 (1914), and Malone v. Kentucky, 234 U.S. 639 (1914).

Court has repeatedly objected to similar provisions: *Connally v. General Constr. Co.*, 269 U.S. 385, 391-93 (1926), involving "current rate of per diem wages in the locality"; *United States v. Pennsylvania R.R.*, 242 U.S. 208, 237-38 (1916), requiring that railroads provide cars for "normal shipments" on "reasonable request or notice"; *Champlin Ref. Co. v. Corporation Comm'n*, 286 U.S. 210 (1932), prohibiting "waste" in the production of crude oil; *Musser v. Utah*, 333 U.S. 95 (1948), prohibiting conspiracies "to commit . . . any act injurious to public health . . . morals . . . trade or commerce." See also *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77 (1932), implying that the statute would be unconstitutional if construed as directly prohibiting "unreasonable variations" between actual and marked weight. Cf. *Smith v. Cahoon*, 283 U.S. 553, 564 (1931); *United States v. Cardiff*, 344 U.S. 174 (1952).

The Government has recognized the relevance of this line of cases and indeed devotes several pages of its revised brief (G.B.R. 35-37) to an attempt to distinguish the *Connally* case. But the standard of the *Connally* statute was more definite than the one in issue here. In *Connally* it was at least fairly clear what facts should be taken into account, *i.e.*, current wages in a particular locality, and these facts were simple and clear cut, even though the standard by which to evaluate them was undeterminable. But here by the Government's own account the relevant facts are of formidable number and complexity, while the standard for their evaluation remains nebulous, if not completely subjective. The Government would distinguish the kind of situation involved in *Connally* by having the Court believe that in a trial under the provision in issue here, a jury would never have to decide what the "right price" was (G.B.R. 9, 36-37).

Even if this were true, obviously sellers cannot afford to leave their fate in such doubt. They must be able to tell whether a price is right—*i.e.*, reasonable—or not in order to comply, and under the constitutional requirement of definiteness, they are entitled to know this from the statute.

With respect to prices the experience of this country has been that, when necessary in regulated segments of the economy, the administration of a standard of reasonableness of prices requires, as the opinion in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940), states, "continuous administrative supervision and readjustment in light of changed conditions." Accordingly the determination of reasonable railroad rates has been committed to the Interstate Commerce Commission, and of reasonable rates for airlines, natural gas pipelines and other regulated industries to other agencies. The historic doctrine of "primary administrative jurisdiction" was developed first in *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), in recognition of the uncertainties inherent in determination of reasonable rates. Under this doctrine the courts refrain from litigating reasonableness issues for the same reasons of complexity and uncertainty which render the "unreasonably low prices" clause invalid as a judicial standard. *United States v. Radio Corp. of America*, 358 U.S. 334, 346-48 (1959).[29]

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29. It should be noted that American Tel. & Tel. Co. v. United States, 299 U.S. 232 (1936), which the Government cites (G.B.R. 9, 25, 33), did not involve the validity of a statute but only the validity of a Federal Communications Commission order prescribing a uniform system of accounts for telephone companies subject to the Communications Act of 1934, issued pursuant to authority vested in the F.C.C. by that Act (299 U.S. at 235). The order was

In World War II, Congress avoided the mistake of the unconstitutional World War I Lever Act by establishing an administrative agency under the Emergency Price Control Act for the comprehensive control of prices. The complexities and difficulties which confronted the Office of Price Administration in its monumental task of determining proper price levels are well-known to the Court. Section 3 of the Robinson-Patman Act would call upon the trial courts to decide equally difficult price control questions without standards, experience, or any centralized guidance. And their decisions would have no mere future effect, but would adjudicate, in a criminal proceeding with the liberty of individual defendants possibly at stake, the rightness or wrongness of past conduct.

B. Decisions Relied Upon by the Government Do Not Involve Situations Analogous to the "Unreasonably Low Prices" Clause.

The Government continues to ignore the long line of precedent and experience revealing that the Court has never viewed the common law, antitrust policy, or business practice as endowing prohibitions of unreasonable *prices* with constitutional certainty. In the face of these decisions, the rationale of its defense of the "unreasonably low prices" clause rests on the assertion that some nebulous combination of these traditions does somehow infuse into the other-

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to be administered by the F.C.C. and provided only civil sanctions for its violation. The portion of the order claimed to be too vague, construed by the Court as utilizing fraud as the standard of guilt, presented substantially the same issue that confronted the Court later in a criminal context in United States v. Ragen, 314 U.S. 513 (1942), discussed *infra*, pp. 71-72.

wise vague statutory language enough definiteness to meet minimal standards of the Constitution (see, *e.g.*, G.B.R. 25).

The issue is not, as lengthy arguments in the Government's brief would imply (see G.B.R. 25-30), whether under any circumstances a vague statutory term may acquire meaning from a source outside the statute. It is clear that it may. The problem here is whether *this* statute, the "unreasonably low prices" clause of Section 3 of the Robinson-Patman Act, does in fact derive meaning or definiteness from some such outside source. We have shown that as the context in which this clause is read broadens, the clause becomes less, not more, meaningful. We have shown also that an unbroken line of Supreme Court precedent—all of it dealing with prices and therefore directly in point—holds that there is no outside source from which language such as is in issue here can borrow the standard or meaning it needs to become constitutional. In this section we will show that neither the cases cited by the Government nor the common law doctrine of the reasonable man is applicable here to upset that settled and controlling precedent.

The only case the Government cites which had to do with prices is *Edgar A. Levy Leasing Co. v. Siegel*, 258 U.S. 242 (1922). But the *Levy* opinion recognized that the rule of *Cohen Grocery* would have been applicable if the statute had provided criminal sanctions (258 U.S. at 250). Contrary to the Government's assertions (G.B.R. 28-29), the *Levy* case, which was explained at length in *A. B. Small Co. v. American Sugar Ref. Co.*, 267 U.S. 233 (1925), is completely distinguishable. The state emergency housing statute in issue included definitions; in the Court's words, it "was not silent as to what should be deemed a . . . reasonable . . . reservation of rent . . . [but] recognized and

named elements which would require consideration . . ." (267 U.S. at 241, emphasis added). And these definitions were written into the statute even though its application was limited to urban real estate income and values which at the time, the Court said, were "stable and easily ascertained" (*ibid.*). The Court contrasted the stability of these values with those that might appertain to commodities of the kind subject to the Lever Act (267 U.S. at 241):

> "While sugar has a market value, that value is subject to fluctuations which individual manufacturers can neither control nor readily foresee. The price in one trade center is affected by that in others, and in all there are material variations, even in short periods."

Obviously, commodities moving in interstate commerce which are subject to the "unreasonably low prices" clause are the same kinds of commodities that the Lever Act purported to regulate. Therefore the *Cohen* and *Small* precedents leave no room for doubt that Section 3's revival of the still undefined Lever Act language is unconstitutional.

The Government's attempt to justify the "unreasonably low prices" language rests primarily on its Procrustean adaptation to this purely economic situation of the common law doctrine of the reasonable man, developed through countless cases over the centuries to measure negligence in situations in which community standards provide a test of reasonable behavior which can be "measured by common understanding and practices." *United States v. Petrillo,* 332 U.S. 1, 8 (1947). As Mr. Chief Justice Taft's exhaustive analysis of the cases in *Cline v. Frink Dairy Co.,* 274 U.S. 445, 464 (1927), shows, however, there is no common law tradition or experience for determining reasonable prices.

Negligence, he said, "is a standard of human conduct which all are reasonably charged with knowing and which must be enforced against every one in order that society can safely exist . . . ." "But this does not justify," the Court pointed out, ". . . holding the average member of society in advance to a rule of conduct measured by his judgment and action in respect of what is a reasonable price. . . . ." (274 U.S. at 464). "[I]t will not do to hold an average man to the peril of an indictment for the unwise exercise of his economic or business knowledge involving so many factors of varying effect that neither the person to decide in advance nor the jury to try him after the fact can safely and certainly judge the result" (274 U.S. at 465).[30]

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30. Accordingly, the other Supreme Court cases cited in the Government's brief (G.B.R. 27-33) are not relevant. The statutes in Ratner v. California, 321 U.S. 755 (1944); Miller v. Oregon, 273 U.S. 657 (1926); Boyce Motor Lines, Inc. v. United States, 342 U.S. 337 (1952); and Sproles v. Binford, 286 U.S. 374 (1932), relate to negligence situations (see especially the detailed explanation of *Miller v. Oregon* in Cline v. Frink Dairy Co., 274 U.S. 445, 464-465 (1957)). *Boyce* and *Sproles* invoke, beside the common law standard of due care, still more easily ascertainable standards based on distance and actual alternative routes. Standards invoked by the statutes tested in the remaining cases are also definite: United States v. Petrillo, 332 U.S. 1 (1947), discussed *infra*, pp. 72-73 (coercion); Jordan v. DeGeorge, 341 U.S. 223 (1951) (moral turpitude construed by the Court to include *all* crimes involving fraud); McGowan v. Maryland, 366 U.S. 420 (1961) (products actually sold at beaches and amusement parks in the county); United States v. Spector, 343 U.S. 169 (1952) ("timely" defined by the statute to mean six months and "necessary" to mean the legal requirements for entry into an identified country); United States v. Ragen, 314 U.S. 513 (1942), discussed *infra*, pp. 71-73

The Court has also unequivocally rejected the suggestion that *Nash v. United States*, 229 U.S. 373 (1913), which upheld Section 1 of the Sherman Act, dictates a contrary result. Indeed, the Court expressly considered the *Nash* precedent in both the *Cohen Grocery* (255 U.S. at 92) and *Cline* opinions, and in both it readily distinguished the question of unreasonable restraint of trade from that of unreasonable prices.

Section 1 of the Sherman Act was upheld in *Nash* because its language referred to and attained certainty from the settled "common law as to restraint of trade . . . taken up by the statute . . ." (229 U.S. at 377). The Sherman Act, this Court has more recently pointed out, "made a standard long recognized by the common law the statutory test." *Herndon v. Lowry*, 301 U.S. 242, 263 (1937). As Mr. Chief Justice Taft explained in *Cline* (274 U.S. at 460), in *Nash* "we held that the common law precedents as to what constituted an undue restraint of trade were quite specific enough to advise one engaged in interstate trade and commerce what he could and could not do under the statute." Quoting from his early and now celebrated opinion in *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271, 283-84 (6th Cir. 1898), he said that the question of undue restraint of trade does not rest on so " 'shifting, vague, and indeterminate a standard' " as does that of the "reasonableness of prices" (274 U.S. at 462).

In the first oral argument of this case, several related

(fraud). In Bandini Petroleum Co. v. Superior Court, 284 U.S. 8, 16-18 (1931), the state court had already given the statutory language a precise and workable construction based on the industry's technological developments known to all affected by the statute.

questions were raised concerning the distinction, as to definiteness, between the clause in issue and the Sherman Act's "rule of reason." Accordingly, we would like to point out the substantial reasons for this distinction to which the Court has uniformly adhered in both the constitutional cases, including *Cohen Grocery* and *Cline,* and the antitrust cases, including *Trenton Potteries* and *Socony-Vacuum.* The difference in essence is that there are no accepted or ascertainable standards known to the criminal law for deciding when a price is "unreasonable." On the other hand, the "rule of reason" as applied to restraints of trade has a clear meaning evolved through over 200 years of common law precedent and statutory interpretation, and it was this established meaning to which Mr. Justice Holmes referred in *Nash,* and Mr. Chief Justice Taft in *Cline.*

The rule of reason is believed to have originated in *Mitchel v. Reynolds,* 1 P. Wms. 181, 24 Eng. Rep. 347 (K.B. 1711). Since its adoption as the rule of construction of the Sherman Act, in *Standard Oil Co. v. United States,* 221 U.S. 1 (1911), it has been applied to render illegal only those contracts, combinations and conspiracies which unduly restrict competition, while not invalidating those which have only an insubstantial effect. *Att'y Gen. Nat'l Comm. Antitrust Rep.* 11 (1955). Under this test, reasonableness is a measure of the extent to which a given arrangement reduces competition. It applies to only a limited class of business arrangements, which are unusual and are set apart from the general run of commercial activities because they all involve agreements which restrict competition. It applies only to reduce, not to enlarge, the number of such agreements to be held illegal.

Moreover, the great majority of cases brought under the

Sherman Act fall into classes of restraints which have been held by the Court to be inherently or per se unreasonable. In this respect, the law is especially definite in a constitutional sense: *i.e.*, price fixing, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); division of territory, *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899). *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951); boycotts, *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); and tying restrictions imposed by dominant sellers, *Northern Pac. Ry. v. United States*, 356 U.S. 1 (1958).

In contrast, the "unreasonably low prices" phrase has no common law or statutory meaning whatever. It has acquired none through decisions. It would measure something totally different from what the rule of reason measures, *i.e.*, the dollar and cents level of a price, not whether competition has been reduced. It would apply to every commodity price transaction in commerce, rather than to a relatively small group of special agreements. It envelops low prices generally in a cloud of potential illegality whereas the rule of reason operates to reduce and ameliorate the criminal incidence of the law on restraints of trade. When read in terms of their legal significance, the Sherman Act test has a meaning firmly fixed to the most reliable of guideposts, but the "unreasonable price" test is not moored to any known standard which a court can administer.

Long ago, economic society abandoned the Middle Ages idea of a "just" price.[31] Ever since, morality and ethics have

31. See HAVIGHURST, THE NATURE OF PRIVATE CONTRACT 101 (Northwestern Univ. Press, 1961.)

not provided either a legal or a business standard for the measurement of price. In private transactions in the unregulated segment of the economy to which the antitrust laws are applicable, prices are determined by contract of the parties under market conditions usually involving competition. Although courts adjudicate disputes as to the terms of contracts, they do not attempt to judge in private legal actions whether prices are too high or too low. For the unregulated portion of the American economy, it is a basic legal and economic postulate that prices will be determined, not by moral or legal restraint, but under the constraints imposed by competition in the market. This freedom of prices to move according to the pressures of a competitive market price system is so vital that the Court, in the opinion by Mr. Justice Douglas in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940), has called it the "central nervous system of the economy."

Plainly, Mr. Justice Holmes' further observation in *Nash*, that "the law is full of instances where a man's fate depends on his estimating rightly . . . some matter of degree" (229 U.S. at 377), refers to the fact, noted by the Government (G.B.R. 26), that the application of all statutes, written as they are in general terms, is allowably subject to some doubt in particular cases, and uncertainty merely as to the outcome of particular cases is not unconstitutional. But Mr. Justice Holmes certainly did not mean that criminal statutes need have no definiteness or ascertainable standards. His later decision in *International Harvester* made it clear that substantial uncertainty as to the meaning of a statute on its face is unconstitutional, and the opinions in which he joined in *Cohen Grocery* and *Cline* show clearly that an attempt to

prohibit unreasonable prices, without more, involves statutory uncertainty of the kind that is unconstitutional.

Like the Sherman Act, the statute involved in *United States v. Ragen*, 314 U.S. 513 (1942), another case on which the Government relies, has a common law foundation. The *Ragen* statute prohibited wilful tax evasion. The case actually involved no attack on the statute on its face, which, as the Court pointed out, "standing alone, is not vague" (314 U.S. at 523). Obviously, whether a businessman has been guilty of tax evasion is a question that invokes an objective and familiar common law standard of determination, *fraud*. No such standard is present when the question is merely whether he has set an "unreasonable" price. "[S]uch acts of bad faith," the Court observed, "are not beyond the ready comprehension either of persons affected . . . or of juries called upon to determine violations . . ." (314 U.S. at 524). The issue actually posed to the Court in *Ragen* was the statute's application to the particular case, and the Court held that its application to the deliberate padding of business expenses for which the statute allows "reasonable" deductions was not too uncertain. The allowability of reasonable deductions did not, the Court held, "so transform the nature of the offense as to make actors less aware that they are committing it or juries less competent to detect it" (*ibid.*).

Moreover, even if the statute in *Ragen* were in point, the application of that statute dealt with a comparatively simple situation, a corporate income tax return filed long after the fact. Every relevant fact was fixed: the services rendered, the compensation paid, the reasons, and the pertinent market conditions. A deduction claimed under such

known circumstances is not comparable to a price set, as any price must necessarily be, for the future and on the basis of estimates, projections, and pure guess. Indeed, the Court's opinion in *Ragen* expressly distinguished *Cohen Grocery* on just this basis: where an unreasonable price was prohibited, no standard was afforded (255 U.S. at 89, 92), whereas in the tax evasion situation "no such unworkable standards" were involved (314 U.S. at 523).

Similarly in *United States v. Petrillo,* 332 U.S. 1, 6 (1947), where the Court upheld a statute which prohibited coercing an employer to hire more employees than were "needed to perform actual services" because "persons of ordinary intelligence would . . . know when their compulsive actions would force a person against his will to hire employees he did not need," the facts to be evaluated were ascertainable. The statute required, moreover, not just wilfulness, but *coercion*. While the Court agreed that it was still necessary to determine the need and that the employer's opinion as to the number of persons he needed should not be conclusive, it is clear that the number of relevant factors would in any case be few and would always have as a firm standard for comparison the *actual* services to be performed. Moreover, the "need" invoked as one standard in the statute in *Petrillo,* unlike the "reasonableness" standard in issue here, *is* a standard in actual use in all businesses—by employers, employees, and union leaders. Decisions on the number of employees to hire are in fact made on the basis of what is needed to do the work to be done. It is a problem constantly faced and solved in all businesses. Accordingly, the Court held the statute sufficiently definite "when measured by common understanding and practices" (332 U.S. at 8).

Thus the statutes involved in both *Ragen* and *Petrillo* deal with comparatively uncomplicated situations in which the principal facts, actual expenditures and actual services, cannot be in doubt. Moreover, each of those statutes required proof, in accordance with ascertainable common law standards, of fraud or coercion, and both were clearly practicable in operation. The Court's remark that under the *Ragen* statute, "thousands of corporations have filed income tax returns . . . and there has not been any apparent general confusion . . ." (314 U.S. at 524), contrasts markedly with its observation of the evident unworkability of the "unreasonably low prices" clause of Robinson-Patman: "It is worthy of note that the Department of Justice has never, so far as we have been able to determine, brought proceedings under this provision . . . ." *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373, 378 n.7 (1958).

The obtuse complexity of the "unreasonably low prices" clause is well-illustrated, as pointed out above, by the Government's strained attempts to say here what the statute it has so belatedly invoked means. The clear judgment and experience of the Court, developed in a long line of cases, is that workable standards are not afforded for those subject to a statute, or for judge and jury, when, as here, the legality of a price in criminal cases is made dependent on its "reasonableness." The Government's showing does not diminish or deflect the force of this precedent but points instead to the especial propriety of following it here.

C. The Statute's Failure to Make the Act Proscribed Ascertainable Is Not Remedied by Its Requirement of a Specific Intent.

As the preceding section has shown, the law is settled that the phrase, "unreasonably low prices", taken alone is

too vague and indefinite to constitute a constitutionally adequate description of a criminal act. The Government continues to argue, however, that the additional statutory requirement for conviction, a showing that the unreasonable price was set with a specific intent, changes the constitutional result (G.B.R. 23-24).

Its argument is no longer premised, as it was in its first brief, on the claim that the intent required by this statute is bad faith or criminal scienter of the kind present by judicial construction in the statutes tested in *Screws v. United States*, 325 U.S. 91 (1945), and *Cramp v. Board of Pub. Instruction*, 368 U.S. 278 (1961) (G.B.R. 23-24). The Government now recognizes, as Mr. Justice Douglas stated in *Screws* and as the Court unanimously held in *Cramp*, that "wilful conduct cannot make definite that which is undefined." 325 U.S. at 105; accord, 368 U.S. at 283-84. To require intent of that sort would not, after all, detract from *Cohen Grocery* and *Cline* as controlling precedents. Since the prohibition of the Lever Act was limited to wilful acts and the Colorado statute invalidated in the *Cline* case permitted such combinations in restraint of trade as had a reasonable purpose, the Court would have upheld the statutes in those cases if a requirement of wilfulness or bad faith were enough to save an otherwise unconstitutionally vague statute.[32]

The Government has therefore abandoned its reliance on *Screws* and now not only concedes, but emphasizes, the separateness and independence of the constitutent elements of the crime this statute purports to create (G.B.R. 18, 24). But the Government has failed to acknowledge that this

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32. These cases are discussed in greater detail at pp. 35-40 of appellees' original brief on the merits.

fact increases, rather than decreases, the uncertainty of the statute. Where there is no necessary relationship between the act proscribed and the specified intent, the statutory intent, unlike the requirement in *Screws* and in *Hygrade Provision Co. v. Sherman*, 266 U.S. 497 (1925), that a particular statute be wilfully violated, could accompany, as we have already shown, almost any routine and innocent business act. Accordingly, it differs completely from the kind of intent involved in all the decided cases in which intent has been considered to be of some aid to certainty.

That the purpose requirement here does not clarify the meaning of the provision in issue is shown by the sections of the Government brief purporting to state in practical terms what proof will be adduced to show a violation of the dual requirements of this statute. As we have pointed out, on the basis of its proffered test of a price claimed to be "below cost," the Government will invite judicial presumptions not only of unreasonableness but of intent to destroy competition. If, however, this resort to fiction exemplifies the Government's claim that the intent requirement clarifies the statute and eliminates the danger of a purely subjective determination of guilt by judge or jury (see G.B.R. 23), then surely its "assurance of protection" is, as Mr. Justice Jackson warned, "a hoax" because "*the requirement of specific intent is now to be wiped out with a presumption.*" *Koehler v. United States*, 342 U.S. 852, 854 (1951) (dissenting from denial of certiorari) (emphasis added).

Nor is the Government's position any more tenable when it discusses the statute generally. When all the verbiage is culled away, we have shown that what is really suggested is that unreasonableness means acting with the proscribed intent. But there is clearly no warrant in the statute

itself for this kind of circumlocution. As we have pointed out, the Government itself in its general analysis of the statute not only admits that the statute's tests are independent but states that Congress deliberately refrained from passing a statute proscribing "all sales 'for the purpose of destroying competition or eliminating a competitor' " and, indeed, adds that such a statute would be "open to serious objections" (G.B.R. 18). Yet this is exactly the construction urged when the Government comes to defend and apply the very different statute Congress actually enacted. Construction of a statute in a manner so clearly at variance with "the natural import of its terms" (*United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 83 (1932)) would, contrary to the Government's representation, in itself constitute a deprivation of fair warning. *United States v. Cardiff*, 344 U.S. 174, 176-77 (1952).

Moreover, as the Government points out, a "goal of antitrust policy is to provide purchasers the highest quality of goods at the lowest price," and in a competitive society this will normally result in the elimination of inefficient competitors through price competition (G.B.R. 18). From the point of view of the individual businessman, this process of competitive pricing seems a very real—and sometimes personal—rivalry. Although he sets his prices with the primary purpose of retaining and even increasing his share of the total business, he must take his competitors' prices into account and, as a practical matter, he knows that if his share increases, those of others will in all probability decrease. The competitive businessman is, we submit, careless, if not hopeful, of this result.

In its first brief to this Court (at p. 20) the Government

argued, quoting from *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 340 (1952), that it is not "unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line." While the Government no longer expressly relies on that quotation, its proffered interpretations of the statute display the same philosophy. But it is manifestly unfair to impose the risk of criminal conviction when no legal line is visible, and then to add that the seller will be found guilty if as he approaches the unseen line his attitude is the one he is ordinarily encouraged to have. It is not "familiar to the criminal law" to make anyone take such a risk. *United States v. Wurzbach*, 280 U.S. 396, 399 (1930).

III. THE ISSUE BEFORE THE COURT IS THE CONSTITUTIONALITY OF THE PROHIBITION OF "UNREASONABLY LOW PRICES," AND NOT OF SALES BELOW COST.

Retreating from the insupportable position taken in its original brief to this Court, that the indictment rather than the statute governs the issue of unconstitutional vagueness, the Government now concedes the "settled rule that if the challenged provision of the statute is itself so vague and uncertain as to be repugnant to due process, specification of the details of the offense in the indictment will not serve to validate the statute" (G.B.R. 48). Nevertheless, it continues to urge that the question here is limited to "the constitutionality of this statute *as applied to the litigant* and . . . [not the general validity of the statutory provisions . . ." (G.B.R. 43, emphasis added; see also 48-49), and in reliance on this proposition the Government has now for the first time expressly bound itself to limit its proof at trial to showing "sales below cost" (G.B.R. 45-48).

Appellees have never conceded, and do not now concede, that the statute gives warning of the illegality of the offenses described in the illustrative second paragraphs of the Robinson-Patman counts of the indictment. The Government's contrary statement of our position at page 49 of its latest brief is wholly wrong. Our contention is and has always been that the statutory clause at issue does not give adequate notice or fair warning of what conduct it proscribes, whether the conduct specified by way of example in the indictment or any other.

Our analysis of the language of the statute, made as an aid to the Court in determining its constitutionality, has however been an analysis of the statute on its face—and not, as the Government would like it to be, an analysis that assumes the statute already to have been authoritatively construed as a prohibition against "sales below cost". We have shown that the language of the statute itself does not lend itself to any interpretation—the one proffered by the Government or any other—that would be meaningful to those to whom it is to be applied.

A. The Indictment is Not Limited to "Sales Below Cost."

Each Section 3 count contains two paragraphs under the heading, "Offense Charged—Robinson-Patman Act" (Counts Two, R. 9; Four, R. 12; Six, R. 15; Eight, R. 18; Ten R. 22; Thirteen, R. 28; and Fifteen, R. 32). The first, paraphrasing the statute, alleges that one of the defendants "sold milk . . . at unreasonably low prices for the purpose of destroying competition . . . in violation of Section 3" of the Robinson-Patman Act. The second paragraph adds that "pursuant to and in effectuation of the offense charged" in

the preceding paragraph the defendant utilized advantages of operating in many geographical localities to finance a price war against small competing dairies "by intentionally selling milk . . . at prices below National's cost."

As the second paragraph states, the "offense charged" is that alleged in the first paragraph, where the allegations are not in terms of sales below cost, but are in the language of the statute, "unreasonably low prices." The Government recognizes that the statutory phrase was intended to cover sales at "unreasonably low" prices whether above or below "cost" (G.B.R. 42). This language should not be read differently when used verbatim in the charging paragraphs of the indictment. If the indictment had been intended at the time it was drawn to be limited as the Government now argues, it would simply have alleged in one paragraph that defendant had sold milk at prices below cost in violation of the "unreasonably low prices" prohibition.[33] Cases cited by the Government suggesting that the specification would have had that effect if it had appeared in a bill of particulars are hardly relevant here where no such bill has been filed and the claimed particularization appears in the indictment itself, introduced by language which shows that it is illustrative rather than limiting. The Government cites no case involving an indictment with language paralleling the language it used to draft this one.

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33. This is the method actually followed in the Sherman Act counts of the indictment where the type of restraint charged is alleged as part of the overall allegation of violation, viz., "a combination and conspiracy to fix in-store milk prices and to eliminate competition in the sale of milk . . . in unreasonable restraint of" trade (*e.g.*, Count One, R. 7), and accordingly can hardly be argued to be a form unfamiliar to those who drafted the indictment.

Representations made by Government counsel to the trial court established the indictment as having a broader scope than below-cost sales. In the course of the oral argument counsel undertook to summarize how the Government would attempt to show the unreasonableness of defendant's prices (R. 114). The court then asked whether the case against defendants was limited to sales below cost. Government counsel expressly stated that it was not so limited (R. 115):

> "The Court: Well, do you understand that it is a requirement that to be an unreasonably low price it must be below cost?
>
> "Mr. Eisen: No, it does not have to be below cost."

Defendants' counsel recognized, as the indictment makes clear, that "one argument" the Government was making was that a "sale below cost" was an unreasonably low price within the meaning of Section 3 (R. 95; see G.B.R. 46 n. 5), and, quite naturally, he answered that Government contention, among others. But the record shows clearly that all counsel and the court below recognized that both the applicable constitutional doctrine and the indictment squarely raised the question of the constitutionality of the statute on its face.

Neither the Government brief below, nor the written statements on behalf of defendants (R. 33, 71), interpreted the indictment as limited to sales below cost. Relying expressly on those briefs (R. 121-22), both the trial court's oral opinion and its order of dismissal construed the indictment as a general allegation of unreasonably low prices (R. 122-23).

The district court held the clause in issue here, on which

the indictment before it was based, so vague and indefinite as to violate the due process and notice requirements of the fifth and sixth amendments and therefore unconstitutional on its face. On the basis of that holding the Government invoked the jurisdiction of this Court under the Criminal Appeals Act to review directly a district court judgment "dismissing any indictment . . . where such . . . judgment is based *upon the invalidity . . . of the statute* upon which the indictment is founded . . ." (34 Stat. 1246 (1907), 18 U.S.C. § 3731 (1958), emphasis added) The Government in its Notice of Appeal described the indictment as "charging defendants with charging unreasonably low prices . . ." and did not so much as mention sales below cost (R. 124-25). The Notice stated without any qualification that the question presented by this appeal is whether the "unreasonably low prices" clause of the Act is constitutional (R. 124-25). Indeed, not until this second brief on the merits has the Government gone so far as to state expressly that it considers itself to be limited at trial to evidence of sales below cost (G.B.R. 45-48).

We appreciate that these representations would be binding on the Government if there were a trial on the Robinson-Patman counts. But the Government's narrow interpretation of the indictment offered on appeal, even if the scope of the indictment were relevant, is powerless to limit the scope of the appeal and the issue before this Court. Whatever the Government may now stipulate with respect to the indictment, the construction of it by the trial court is controlling for any purposes to which it may be pertinent in this appeal under the Criminal Appeals Act. *United States v. Winslow*, 227 U.S. 202, 216-17 (1913); *United States v. Borden Co.*,

308 U.S. 188, 193 (1939); *United States v. Jones*, 345 U.S. 377, 378 (1953). There can be no dispute that the trial court never indicated any intention to treat the indictment as limited to "sales below cost."

B. The Language of the Statute, Not of the Indictment, Must Be Tested.

Under the decisions of the Court the scope of the indictment has no relevance to the question of statutory vagueness. The vagueness doctrine deals with a defect inherent in the statute itself, one which renders the statute void for any purpose. The Court will not, of course, make a pronouncement of unconstitutional vagueness without having before it a genuine case or controversy, involving a defendant who can show that he will be injured by the statute's enforcement. But standing "to attack the . . . statute upon the ground that it is so vague as to deprive him of liberty or property without due process of law . . ." inheres in anyone who " 'has sustained or is immediately in danger of sustaining some direct injury as the result of [the statute's] enforcement.' " *Cramp v. Board of Pub. Instruction*, 368 U.S. 278, 283-85 (1961), quoting *Massachusetts v. Mellon*, 262 U.S. 447 (1923).

The indictment could be relevant to such an attack only if the peculiar facts of the cases were somehow relevant. The question would then be one best decided after trial. But a vagueness issue could never be decided on an appeal under the Criminal Appeals Act if this theory were accepted since at that stage the facts are still unknown. So far as we have been able to determine, however, in every case brought to this Court, as in the instant case, on direct appeal under the Criminal Appeals Act after a district court had held an

act of Congress unconstitutional for vagueness, this Court has looked to the face of the statute to determine the constitutional issue: *United States v. Harriss,* 347 U.S. 612 (1954); *United States v. Five Gambling Devices,* 346 U.S. 441, 453-54 (concurring opinion), 456-59 (dissenting opinion) (1953); *United States v. Kahriger,* 345 U.S. 22, 33-34 (1953); *United States v. Spector,* 343 U.S. 169 (1952); *United States v. Petrillo,* 332 U.S. 1 (1947); *United States v. Shreveport Grain & Elevator Co.,* 287 U.S. 77 (1932); *United States v. Wurzbach,* 280 U.S. 396 (1930); *United States v. Alford,* 274 U.S. 264 (1927); *United States v. L. Cohen Grocery Co.,* 255 U.S. 81 (1921); cf. *United States v. Evans,* 333 U.S. 483, 495 (1948); *United States v. Classic,* 313 U.S. 299, 309 (1941).[34] The application of the same rule with respect to a state statute is most recently illustrated by the Court's unanimous decision in *Cramp v. Board of Pub. Instruction,* 368 U.S. 278 (1961), holding a state statute unconstitutional on its face.

The present case is indistinguishable in this respect from, for example, *United States v. Petrillo,* 332 U.S. 1 (1947), which involved an information drawn in much the same form as the indictment here (332 U.S. at 5). The Court there held that the question "squarely" raised by the appeal under the Criminal Appeals Act was "whether the section invoked in the indictment is void in toto, barring all further actions under it, in this, and every other case"

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34. In United States v. Wurzbach, 280 U.S. 396 (1930), there is substantial discussion of the details of the indictment, but this consideration clearly came only after the Court had determined that the statute challenged was valid on its face, "perfectly intelligible" (*id.* at 398).

(*id.* at 5-6). The Court stated further that "whether the contested section is written so vaguely and indefinitely that one whose conduct is affected could only guess what it meant" was a question then "ripe" for decision (*id.* at 6).

The Government concedes that a statute may be examined on its face provided the constitutional question involves statutory vagueness "in the area of First Amendment liberties" (G.B.R. 50). But the cases support no such limitation. On the contrary, the Court's ability to protect First Amendment liberties threatened by vague statutes derives from the vagueness doctrine itself, not from some special exception to it, as the Court's opinions in *Winters v. New York,* 333 U.S. 507, 518-19 (1948), and *Cramp v. Board of Pub. Instruction,* 368 U.S. 278, 283-88 (1961), unequivocally demonstrate. It should be emphasized, however, that the cases on which appellees place their primary reliance, both with respect to the scope of the issue and its merits, are not cases involving First Amendment problems. They are cases in which the civil right imperiled is simply the basic right the vagueness doctrine was directly designed to protect, freedom from "exaction of obedience to a [statutory] rule or standard that is so vague and indefinite as to be really no rule or standard at all." *Champlin Ref. Co. v. Corporation Comm'n,* 286 U.S. 210, 243 (1932).

A statute which embodies no ascertainable standard of guilt is, under the decided cases, unconstitutional on its face; obviously it cannot, even in the most extreme circumstance, be constitutionally applied. The clear statements of this Court to this effect in *Lanzetta v. New Jersey,* 306 U.S. 451, 453 (1939), and *United States v. Spector,* 343 U.S. 169, 171 (1952), cannot be distinguished, as the Gov-

ernment suggests (G.B.R. 50), but go to the heart of the problem that application of the vagueness doctrine poses to this Court. In *United States v. Harriss,* 347 U.S. 612 (1954), another case involving the quashing of an indictment brought under a federal statute, and one on which the Government still seems to rely (G.B.R. 44), the Court, though divided on the merits, was unanimous in rejecting the Government's claim that the question was merely whether the statute's application to the particular situation described in the indictment was unconstitutional (347 U.S. at 617, 629 (dissent of Douglas, J.), 633 (dissent of Jackson, J.).

Contrary to the assertions in the Government's brief, *Robinson v. United States,* 324 U.S. 282 (1945), enunciates no different rule. The majority there saw the case simply as one of statutory construction. It was only after the Court had construed the statute and determined that it had been correctly applied by the court below that the opinion turned to what was obviously a rather makeweight vagueness argument. Deeming the contention frivolous, the Court pointed out that the words in question, "liberated unharmed", contained no more uncertainties than "lurk" in "most English words and phrases" (324 U.S. at 286). The congressional purpose was, it held, "clearly expressed" (*ibid.*). Only under these circumstances, when it had determined that the statute was clearly *not* unconstitutionally vague, did the Court observe that it was unnecessary to consider the outcome of hypothetical cases that might never arise (*ibid.*), that is, whether a statute that successfully describes the "general class of offenses to which [it] . . . is directed . . ." (*United States v. Harriss,* 347 U.S. 612, 618 (1954)), and so is constitutional on its face,

might in a marginal case be susceptible of unconstitutional application.

Neither do the remaining cases cited by the Government support its position. None involved vagueness issues, and no attack on the statutes themselves was entertained, although in *United States v. Raines*, 362 U.S. 17 (1960), the Court expressly recognized that a challenge to a statute for vagueness presents a situation in which the statute must be judged on its face (*id.* at 22, 24). Three of the cited cases (G.B.R. 44) involved situations in which it had not been shown that those who brought the actions, which were for injunction or declaratory judgment, would be injured by enforcement of the challenged statutes. Accordingly, they turned on the question of the existence of a case or controversy. The natural reluctance of the Court to entertain actions brought to vindicate the rights of third parties (*Barrows v. Jackson*, 346 U.S. 249, 255 (1953)) or to rule on the constitutionality of a state statute before the state courts had been given an opportunity to construe it (*Alabama State Fed'n of Labor v. McAdory*, 325 U.S. 450, 459, 462, 470-71 (1945)) or to comment on the "political expediency" of an act of Congress (*United Pub. Workers v. Mitchell*, 330 U.S. 75, 89 (1947)) has little to do with the case at bar.

The threat to appellees here is hardly "hypothetical." Both have been indicted in the words of a federal statute. Both risk criminal conviction. The Court's comment in *Cline v. Frink Dairy Co.*, 274 U.S. 445, 457 (1927), is particularly apt: "the whole statute [is] without a fixed standard of guilt in an adjudication affecting the liberty of the one accused."

The vagueness in the statute here is not merely the ambiguity of everyday English, but is that of a statute which by the Government's own description can be approached only by those having expertise not only in the language, but in "American history and the evolution of antitrust law" (G.B.R. 25), and in the elusive "standards of the business community" in an imaginary situation in which the forces of competition are to be largely ignored. In this case the Government's position is that if in the indictment an extreme case is alleged, it does not matter that the statute contains no standard of guilt and does not describe the general category of offenses proscribed. This is not the rule of the vagueness cases but a complete reversal of it, one which no authority supports.

CONCLUSION

It is therefore submitted that the decision of the District Court dismissing the Robinson-Patman Act counts of the indictment on constitutional grounds was entirely correct and should be affirmed.

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Dated: October 10, 1962

APPENDIX

This appendix sets forth the full texts of Sections 1 and 3 of the Robinson-Patman Act (49 Stat. 1526-28 (1936)) as they appear in the United States Code (15 U.S.C. § 13, 13a (1959)).

SECTION 1

Section 1 of the Robinson-Patman Act, known as Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, is as follows:

"§ 13. Discrimination in price, services, or facilities.
(a) Price; selection of customers.

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing contained in Sections 12, 13, 14-21, and 22-27 of this title shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, how-*

ever, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further,* That nothing contained in said sections shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further,* That nothing contained in said sections shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

"(b) **Burden of rebutting prima-facie case of discrimination.**

"Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Com-

mission is authorized to issue an order terminating the discrimination: *Provided, however*, That nothing contained in sections 12, 13, 14-21, and 22-27 of this title shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishings of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

"(c) Payment or acceptance of commission, brokerage or other compensation.

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

"(d) Payment for services or facilities for processing or sale.

"It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with

the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

"(e) **Furnishing services or facilities for processing, handling, etc.**

"It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

"(f) **Knowingly inducing or receiving discriminatory price.**

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section. (Oct. 15, 1914, Ch. 323, §2, 38 Stat. 730; June 19, 1936, Ch. 592, §1, 49 Stat. 1526.)"

SECTION 3

Section 3 of the Robinson-Patman Act is as follows:

"**13a. Discrimination in rebates, discounts, or advertising service charges; underselling in particular localities; penalties.**

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party

to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

"Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than $5,000 or imprisoned not more than one year, or both. (June 19, 1936, Ch. 592, §3, 49 Stat. 1528.)".

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

NO. 18

UNITED STATES OF AMERICA, *Appellant*

v.

NATIONAL DAIRY PRODUCTS CORPORATION

and

RAYMOND J. WISE, an individual, *Appellees*

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI

PETITION OF APPELLEES FOR REHEARING

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Dated: March 13, 1963

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ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE
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PETITION OF APPELLEES FOR REHEARING

The Court reversed the trial court on February 18, 1963, holding that the "unreasonably low prices" clause of Section 3 of the Robinson-Patman Act is not unconstitutionally vague (__ U.S. __, 83 S. Ct. 594). Three Justices joined in a dissenting opinion. Appellees respectfully petition for a rehearing.

I. THE MAJORITY OPINION JEOPARDIZES PRICE COMPETITION AND THE RIGHT TO BE SECURE FROM VAGUE CRIMINAL ENACTMENTS.

The opinion of the majority tolerates major ambiguities in the statute on questions which are crucial to price competition. The opinion states that the Court need not be con-

cerned with vagueness and uncertainty as to the meaning of this statute, except as the statute is applied in the indictment in this case, because the prohibition is not directed at any "socially desirable" activity (83 S. Ct. 600). But the statute directly inhibits price competition, and requires all to observe a legal line between price competition made criminal, and price competition which is not only lawful, but highly desirable. The confusion into which price competition may thereby be thrown can be shown from the opinion in two ways.

1. The majority holds that selling below cost constitutes selling at "unreasonably low prices." At the same time it necessarily holds that not all sales below cost are at "unreasonably low prices" (83 S. Ct. 600). Selling below cost, the opinion states, is not unreasonable when "mitigated by some acceptable business exigency" (*id.* at 598), or when "made in furtherance of a legitimate commercial objective" (*id.* at 600).

How can anyone know in advance which of the many possible commercial objectives will qualify as "acceptable" or "legitimate"—terms which are as ambiguous as the term, "unreasonably low"? The majority opinion refers only to a few examples, "*such as* the liquidation of excess, obsolete or perishable merchandise, or the need to meet a lawful, equally low price of a competitor" (*ibid.*; italics added). The Government's brief admitted six or seven types of legitimate sales below cost, and we assume that the Court would accept at least those (G.B.R. 41-42).* Our own brief

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* The Brief for the United States on Reargument is referred to herein as "G.B.R.", the Brief for Appellees on Reargument as "A.B.R.," and the printed Transcript of Record as "R."

suggested 14 types which we think the Court would endorse (A.B.R. 35-36). The point is that there is no reliable guide for sellers as to where such a list will end, because the statute contains no standard for what is or is not "unreasonably low." Nor does the separate "purpose" phrase of the statute supply the missing meaning. As the opinion recognizes, the statute contains two elements, "unreasonably low prices," and illegal "purpose," and one cannot be used to define the other without reading one of them out of the statute as it was drawn by Congress. (G.B.R. 11, 18; A.B.R. 11-13.)

This dilemma of lack of equivalence between "sales below cost" and "unreasonably low prices" can be straightened out satisfactorily only by Congress, as the dissenting opinion states (83 S. Ct. 600).

2. The majority opinion is unable to decide whether its own adopted test of "below cost" means below "direct" cost, "fully distributed" cost, or "some other level of cost computation" (83 S. Ct. 599). It states that this may well be an "academic" question in the instant case (*ibid.*). But if "below cost" is to have the decisive criminal importance given it by this opinion, the failure to decide what is meant by "cost," as well as how it is to be determined, and the other difficult questions which cannot be avoided by anyone who must apply a "cost" test (A.B.R. 39-54), is a matter of the utmost constitutional gravity.

Appellees are told that they are not to know until *after* the trial is over what the decisive standard of illegality is. This would appear to violate their rights under the Sixth Amendment. Moreover, all sellers who seek to compete in

price and at the same time to abide by this Court's ruling are left without the crucial cost definition which they must have.

In the many situations involving effective price competition, may not sellers conclude that the Court has made day-to-day price competition legally unsafe, and non-price competition the only secure course?

A "socially desirable" activity is surely endangered (*cf.* 83 S. Ct. 600). No argument to this Court is required to show that the maintenance of free price competition has always been regarded as indispensable to the antitrust goals desired by Congress (A.B.R. 26, 58, 70). *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 224, n. 59 (1940); *United States* v. *Parke, Davis & Co.*, 362 U.S. 29 (1960).

The further statement that this statute's vagueness endangers no "constitutionally protected" right, in contrast to cases involving First Amendment freedoms (83 S. Ct. 599-600), imperils not only the price competition policy of Congress, but the constitutional right of all persons to be protected in all phases of their lives against the oppression of vague criminal enactments. The modern "void for vagueness" doctrine was developed by the Court in cases of largely economic origin (see A.B.R. 55). Is not the threat to the liberty of all within the scope of a vague criminal statute in itself a constitutional problem of sufficient gravity to invoke the Court's constitutional conscience, without the necessity of finding yet a second constitutional problem?

The majority opinion states that the history of Section 3 supports the construction adopted by it (83 S. Ct. 598). Unfortunately, the Court has thus accepted some wholly

unsupported historical assertions of the Government (*cf.* A.B.R. 13-22). But the Court certainly will agree that there is no basis in history for thinking that Congress intended the "unreasonably low prices" clause to be turned into a menace to vigorous price competition. Nor does history invite reversal of the tradition of protecting all persons, whatever their economic station, against the menace to liberty of vague criminal enactments, which can come as easily from economic as from other kinds of law.

II. THE OPINION HAS INCORRECTLY ASSUMED THAT THE INDICTMENT ALLEGES CONDUCT WHICH APPELLEES SHOULD HAVE KNOWN WOULD BE A VIOLATION.

In concluding that the statute is clear enough, at least as "applied" in this case, the majority may have confused the actual indictment with hypothetical cases of very extreme below-cost sales posed from the bench during the oral argument. Actually, the indictment does not allege conduct which appellees should have known would be a violation of this provision. This is especially clear in light of the Court's test of whether the sales below cost are for a "legitimate commercial objective." The Court treats the indictment as if it charged (in the words of the opinion), "sales below cost without legitimate commercial objective and with specific intent to destroy competition" (83 S. Ct. 600). But the indictment alleges no objectives whatever on appellees' part. In the first paragraphs of the relevant allegations, it charges only in the language of the statute. In the second paragraphs, it charges that National used advantages possessed by it "to finance and subsidize a price war against

small dairies selling milk in competition with it . . . by intentionally selling milk to its distributor . . . at prices below National's cost" (*e.g.* R. 9).

The term, "price war," only signifies a given market condition. Merely participating in a "price war" is certainly not illegitimate, and the Robinson-Patman Act does not seek to make it so. As this Court recently stated in another Robinson-Patman Act case, "Such price warfare appears to be caused by a number of basic factors . . ."; and "[w]hatever we do here can neither eliminate nor mitigate the major economic forces which are productive of these price wars." *Federal Trade Commission* v. *Sun Oil Co.*, 371 U.S. 505, 525 (1963).

Further, the charge that National "financed" a price war plainly alleges no more than that National engaged in it, since all sellers in the market necessarily "financed" their part in the "price war." The indictment does not allege how the "price war" began or ended, why it occurred, or that National was in any way responsible for it. If required to go to trial, appellees will show that they did not initiate a price war and that such price reductions as were made by National were defensive (R. 37-40). It may well appear also that other dairies including "small dairies" brought about the price war. The allegations of the indictment are thus consistent with what the Court would treat as "legitimate commercial objectives" on the part of National, and the indictment thus does not allege conduct which appellees should have known would violate the statute.

Moreover, as to the individual appellee, Raymond J. Wise, the statute cannot be sustained by reliance upon sales

below cost allegations, because he is not unequivocally charged with such sales. In the only Robinson-Patman count against him (Count 13, R. 28), he is not named either directly or indirectly in the sales-below-cost paragraph (par. 93, R. 29), and he is charged *only* in the language of the statute (par. 92, R. 28). In fact, the indictment underscores its lack of an unconditional charge of sales below cost against Wise by alleging in the general paragraph describing him that he "authorized or ordered to be done *some or all* of the acts alleged" against National (par. 91, R. 28; italics added).

Whether viewed "on its face," or "as applied," critical vagueness in the "unreasonably low prices" clause is thus disclosed and is left unsolved.

Accordingly, we ask that a rehearing be granted.

Respectfully submitted,

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Dated: March 13, 1963

CERTIFICATE OF COUNSEL

I, John T. Chadwell, counsel for appellees and a member of the Bar of this Court, certify that the foregoing petition for rehearing is presented in good faith and not for delay.

/s/

March 13, 1963

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No. 62

Supreme Court of the United States

OCTOBER TERM, 1962

NORTHERN NATURAL GAS COMPANY, a Corporation,
Appellant,

v.

THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, *Appellee.*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

PETITION FOR REHEARING OF THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS

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March 15, 1963

Supreme Court of the United States

OCTOBER TERM, 1962

No. 62

NORTHERN NATURAL GAS COMPANY, a Corporation,
Appellant,

v.

THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS, *Appellee*.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

PETITION FOR REHEARING OF THE STATE CORPORATION COMMISSION OF THE STATE OF KANSAS

The State Corporation Commission of the State of Kansas prays that this Court grant a rehearing of its Order of February 18, 1963, reversing and remanding the judgments of the Supreme Court of Kansas.

REASONS FOR GRANTING REHEARING

1. The Court's order and judgment are based upon a misunderstanding of the facts in this case. The Court concludes that the State Ratable Take Orders "do not regulate 'production or gatherings'" of gas. (p. 5) On the contrary the record herein demonstrates, even as the dissent points out, that the whole purpose and effect of the State's orders were "to limit production—the physical act of drawing gas from the earth". (See page 4 of Dissent.)

The fact that the orders are directed to purchasers of gas instead of producers does not prevent the orders from being regulations of production. The physical act of producing gas only occurs in a practical sense when a purchaser of gas opens the valve on a particular well and takes gas therefrom. When this occurs the purchaser actually takes gas from the very bottom of the well bore. When the purchaser commits this act and only then is gas produced.

Furthermore, it is the purchaser here who has the legal right to produce the gas. The producer has no such right. Thus, Appellant's contract with Republic (producer) states that "Northern [purchaser] shall have the right to regulate the rate of flow of gas from each well to the extent necessary to enable it to purchase the aggregate volumes of gas herein agreed to be purchased." (R. 151) Therefore to regulate the "rate of flow of gas from each well" the State Commission of necessity had to address its ratable take orders to the party having actual control over the production of gas and having the legal right to regulate the production and the taking of gas, namely the purchaser.

Thus for the Court to conclude that "none of its [Northern's] activities in Kansas shown upon this rec-

ord involve 'production and gathering in the sense that those terms are used in Paragraph 1b' " (p. 5) reflects a misunderstanding of the facts in the record and a failure to appreciate the practical facts of the gas business so necessary to a proper determination of the law that should govern the gas industry and its customers.

2. The majority again misconceives the facts when it rules that a danger of interference with the federal regulatory scheme arises because the state's ratable take orders "shift to the shoulders of interstate purchasers the burden of performing the complex task of balancing the output of thousands of natural gas wells within the state [citation]—a task which would otherwise presumably be the State Commission's." (p. 7)

The State's Orders do not shift such a burden to the shoulders of the interstate purchaser. The latter has by contract voluntarily assumed this burden, if it indeed be a burden. For instance, Northern agrees to the following in its contract with Republic: "The volumes of gas delivered to Northern hereunder as measured at pipeline pressures and temperatures should be computed by *Northern* from the meter records . . . The gas to be delivered hereunder shall be measured by adequate meters of standard type installed operated and maintained by *Northern* at its sole expense . . . Upon Republic's request, Northern shall mail or deliver to Republic for checking and calculation all meter charts and other data or record used in the measurement of gas . . . The charts and records shall be kept by *Northern* for a period of five (5) years for the use of both parties." (R 140-142)

Thus it is Northern, the purchaser, who has by contract obligated itself to keep all the records and charts necessary to demonstrate and compute the "output of thousands of natural gas wells within the state". The State's Orders do not *shift* that burden to Northern.

As a matter of fact it is the purchaser alone who has the necessary records to determine whether gas is being produced from the wells ratably. The only way the State Commission or the producers can secure such information is to ask the purchaser for it. It is the purchaser alone who is in a position to provide ratable taking. Northern recognizes this fact and accordingly in numerous contracts agrees to regulate its purchases so as to take gas ratably and agrees to undertake the necessary computations to assure ratable taking. For instance in its contract with Cities Service Oil Company Northern agrees to purchase gas "ratably (without discrimination) with all natural gas purchased and produced by Northern from the same common source of supply situated in the Kansas portion of the Hugoton Gas Field". And Northern agrees that "such ratable purchases shall be . . . computed under such proper and reasonable nondiscriminatory formulae as Northern may from time to time employ . . ." (R 77)

In view of these contractual commitments the State shifted no computation burdens to the purchaser who had already voluntarily accepted such burdens. To hold otherwise, as the Court did, is to rule contrary to the facts in the record.

3. Basing its judgment upon such misunderstanding of the facts in this case the Court, speaking through the majority, concluded that though there perhaps was no manifest conflict here, nevertheless there was some "possibility of collision" between the state ratable

take orders and the terms of the Natural Gas Act and that therefore the state orders must fall.[1]

Such conclusion besides not being based on fact has no prior law to support it. Always before the Court has held as it did in *Allen-Bradley Local* v. *Wisconsin Employment Relations Board*, 315 U.S. 740 at 714: "* * * this Court has long insisted that an 'intention of Congress to exclude States from exerting their police power must be clearly manifested' ". See also *Kelly* v. *Washington*, 302 U.S. 1; *Huron Portland Cement Co.* v. *Detroit*, 362 U.S. 440; *Buck* v. *California*, 343 U.S. 99, 101-102; *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Commission*, 341 U.S. 329; *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission*, 332 U.S. 507 and cases cited in each case.

There is no clear and manifest conflict between the state orders and the Natural Gas Act. The majority opinion concedes that "collision between the state and federal regulation may not be an inevitable consequence" but asserts that "there lurks" an "imminent possibility of collision". (p. 8) Presumably this statement rests on the opinion's assumption that the state orders "could seriously impair the Federal Commission's authority to regulate the intricate relationship between the purchasers' cost structures and eventual costs to wholesale consumers who sell to consumers in other states". (p. 7) It is to be noted, however, that the opinion does not explain how or in what re-

[1] The Court said and this seems to be the essence of the majority's position: "Therefore although collision between the state and federal regulation may not be an inevitable consequence, there lurks such imminent possibility of collision in orders purposely directed at interstate wholesale purchasers that the orders must be declared a nullity in order to assure the effectuation of the comprehensive federal regulation ordained by Congress." (p. 8)

spects the state orders would or could impair this federal authority. It is significant that the appellant made no claim that the orders, considered alone, would affect the price of gas but as to that point based its entire argument on the consequences that were alleged to follow from the operation of the orders on appellant's contract with Republic. It is also significant that the Federal Power Commission, which may be assumed to be peculiarly cognizant of possible interferences with its own regulatory authority, expressly conceded that if the state orders released appellant from the obligations of its Republic A contract it would not contend that the state action "so impinged upon matters of national, as opposed to local, concern, or that it so interfered with the regulatory functions and purposes of the Federal Power Commission, under the Natural Gas Act, as to require its invalidation under the Supremacy Clause". (Memorandum for the FPC, pp. 21-22.)

4. The decision of the majority, if allowed to stand, substantially impairs, if it does not destroy, state regulation of gas conservation in its historic sense. By the same rationale as the Court here uses to strike down state ratable take orders all other conservation orders will fall. State allowable orders, state regulations requiring the casing of wells, regulations prohibiting the use of certain types of pumps, orders restricting production to a percent of a well's open flow and regulations controlling drilling operations and enforcing pooling in unitization will all fall if the reasoning of the majority opinion is consistently applied.

The policy determination to destroy the states' conservation powers, including the power to regulate the ratable taking of gas, should be undertaken by Congress and not this Court. This is particularly true

where judicial enunciation of such policy is inconsistent with expressed Congressional intent. As was clearly stated in the House Committee report concerning the Natural Gas Act: "The bill takes no authority from state commissions, and is so drawn as to complement and in no manner usurp state regulatory action."[2] We respectfully submit that it is impossible to reconcile this expressed Congressional intent with a decision that deprives the producing states of their long-established and well-recognized power to protect the correlative rights of their citizens by regulating the ratable taking or purchasing of natural gas. (For further discussion, see pp. 14-16 of Appellee's brief.)

Because of the importance of this case, the magnitude and diversity of the public and private interests involved, the sweeping nature of the reasoning embodied in the majority opinion and the fact that the opinion deprives the states of a power which they have long possessed and exercised, we submit that it is appropriate for this Court to reconsider the basis of its decision.

CONCLUSION

For the foregoing reasons The State Corporation Commission of the State of Kansas prays that this Court grant a rehearing of its judgment of February 18, 1963.

Respectfully submitted,

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[2] H.R. Rep. No. 709, 75th Cong. 1st Session p. 2.

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

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